(12)

No. 89-1332-CFX
Status: GRANTED

Title: Gene McNary, Commissioner of Immigration and Naturalization, et al., Petitioners
v.
Haitian Refugee Center, Inc., et al.

Docketed:
February 20, 1990

Court: United States Court of Appeals for the Eleventh Circuit

See also:
89-1018

Counsel for petitioner: Solicitor General

Counsel for respondent: Kurzban,Ira J.

1/3: Ord. granting ext. of time to file, to and incl. 2/17, by Kennedy, J. (CITED); 40 printed copies recd. 2/20

Entry	Date	Note	Proceedings and Orders
1	Dec 29 1989	G	Application (A89-490) to extend the time to file a petition for a writ of certiorari from January 8, 1990 to February 17, 1990, submitted to Justice Kennedy.
2	Jan 3 1990		Application (A89-490) granted by Justice Kennedy extending the time to file until February 17, 1990.
3	Feb 20 1990	G	Petition for writ of certiorari filed.
5	Mar 21 1990		Order extending time to file response to petition until April 27, 1990.
6	Apr 16 1990		Order further extending time to file response to petition until May 12, 1990.
7	May 15 1990		DISTRIBUTED. May 31, 1990
8	May 17 1990	X	Brief of respondent Haitian Refugee Center, Inc. in opposition filed.
9	May 25 1990	X	Reply brief of petitioners Gene McNary, Commissioner of INS, et al. filed.
10	Jun 4 1990		Petition GRANTED.
			**********
12	Jul 5 1990		Order extending time to file brief of petitioner on the merits until August 2, 1990.
13	Aug 2 1990		Joint appendix filed.
14	Aug 2 1990		Brief of petitioners Gene McNary, Commissioner of INS, et al. filed.
16	Aug 22 1990		Order extending time to file brief of respondent on the merits until September 19, 1990.
17	Sep 19 1990		Brief amicus curiae of AFL-CIO filed.
18	Sep 19 1990		Brief amicus curiae of American Bar Association filed.
20	Sep 19 1990		Brief amici curiae of Farm Labor Alliance, et al. filed.
21	Sep 19 1990		Brief of respondent Haitian Refugee Center, Inc. filed.
23	Sep 19 1990		Brief amici curiae of California, et al. filed.
19	Sep 21 1990		Lodging received. (7 copies).
24	Sep 26 1990		SET FOR ARGUMENT MONDAY, OCTOBER 29, 1990. (1ST CASE).
25	Sep 26 1990		CIRCULATED.
27	Sep 26 1990		SET FOR ARGUMENT MONDAY, OCTOBER 29, 1990. (1ST CASE)
26	Oct 12 1990		Record filed.
		*	Certified copy of origianl record and proceedings, 14 volumes, received. (Box).
28	Oct 19 1990	X	Reply brief of petitioners Gene McNary, Commissioner of INS,

2 pp

No. 89-1332-CFX

Entry	Date	Note	Proceedings and Orders
			et al. filed.
29	Oct 29 1990		ARGUED.

89-1332

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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100 pp

QUESTION PRESENTED

The Immigration Reform and Control Act of 1986 provides that there shall be no judicial review of a determination "respecting an application" for Special Agricultural Worker (SAW) status except in the courts of appeals on review of a deportation order (8 U.S.C. 1160(e)). The question presented in this case is whether this provision precludes a federal district court from exercising general federal question jurisdiction over an action alleging a pattern or practice of procedural due process violations by the Immigration and Naturalization Service in its administration of the SAW program.

PARTIES TO THE PROCEEDING

Petitioners, defendants below,* are Gene McNary, Commissioner of Immigration and Naturalization; Richard Smith, Acting District Director, Immigration and Naturalization Service, District Office Number 6, Thomas Fisher, District Director, Immigration and Naturalization Service, District Office Number 26; Lewis DeAngelis, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region; Immigration and Naturalization Service, Department of Justice; James A. Puleo, Acting Associate Commissioner for Examination, Immigration and Naturalization Service; Terrance M. O'Reilly, Assistant Commissioner for Legalization, Immigration and Naturalization Service; Dick Thornburgh, Attorney General of the United States; and the United States Department of Justice. The respondents, plaintiffs below, are Haitian Refugee Center, Inc., a not-for-profit corporation; Roman Catholic Diocese of Palm Beach; Marie Gizele Angrand; Germaine Cadet; Rosita Delva; Dieumercie Desir; Joseph Saintil Dieudonne; Gerard Henry; Marie France Jean-Philippe; Novamise Julien; Francklin Joseph; Sylvia Lindor; Recol Neus; Rose Pierrecina Lebon Pierre; Marie Philomene Servilien; Hector Trejo Tamayo; Juan Tamayo Vega; Marie Raquel Viera; and Jeanette Vixama.

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* The individual petitioners, who are parties in their official capacities, have been substituted for their predecessors in office, Alan C. Nelson, Perry Rivkind, Kenneth Pasquarell, William Chambers, Richard Norton, William Slattery, and Edwin Meese III, respectively. See Sup. Ct. R. 35.3.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of Gene McNary, Commissioner of Immigration and Naturalization, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 872 F.2d 1555. The opinion and order of the district court (App., *infra*, 18a-54a, 55a-57a) are reported at 694 F. Supp. 864.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1989. A petition for rehearing was denied on October 10, 1989. App., *infra*, 58a-59a. On December 28, 1989, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 17, 1990. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Immigration and Nationality Act, 8 U.S.C. 1105a, 1160, are set forth in an appendix (App., *infra*, 60a-63a).

STATEMENT

1. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, "represent[ed] the most comprehensive immigration reform effort in the United States in 20 years." S. Rep. No. 132, 99th Cong., 1st Sess. 18 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, at 51-55 (1986) (describing history of legislation). As an integral part of that effort, Congress established two major legalization programs that permitted certain undocumented aliens in the United States to obtain lawful resident status. The first legalization program applied to aliens who had resided continuously and unlawfully in the United States since January 1, 1982. 8 U.S.C. 1255a. The second program applied to "Special Agricultural Workers" (SAW)—those aliens who had performed at least 90 days of qualifying agricultural work in the United States during the 12 months ending May 1, 1986. 8 U.S.C. 1160(a).

IRCA provided that applicants for SAW status had to submit their applications during an 18-month period beginning June 1, 1987. 8 U.S.C. 1160(a)(1)(A). If an applicant established both 90 days of qualifying agricultural work and his admissibility to the United States as an immigrant, the Attorney General was required to adjust the alien's status to that of temporary resident. 8 U.S.C. 1160(a)(1). In a second phase of the SAW program,

such aliens would become eligible for adjustment of status to that of aliens lawfully admitted for permanent residence. 8 U.S.C. 1160(a)(2).

Congress conferred authority for administering the legalization programs on the Attorney General, who in turn has delegated that authority to the Commissioner of Immigration and Naturalization. 8 U.S.C. 1160, 1255a; 8 C.F.R. 2.1. Under regulations of the Immigration and Naturalization Service (INS), SAW applications were initially processed by specially created legalization offices (LO). The LOs were required to interview each applicant personally, and in such interviews the applicant had to establish eligibility for SAW status. 8 C.F.R. 210.1(h), 210.2(c)(2)(iv) and (c)(4)(i). Thereafter, the applications were adjudicated by one of the four INS Regional Processing Facilities (RPF). 8 C.F.R. 210.1(p).[1] Whenever a SAW application was denied, INS regulations required that the alien be given written notice setting forth the reasons for the denial and the applicant's right to an administrative appeal. 8 C.F.R. 103.3(a)(2), 210.2(f).

IRCA expressly limits the scope of administrative and judicial review in the SAW program. Section 1160(e) of IRCA provides: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. 1160(e)(1). The subsection then directs the Attorney General to establish an "appellate authority to provide for a single level of administrative appellate review," and provides that "[t]here

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[1] As amended, the regulations permitted INS district directors to approve SAW applications if an RPF had required a second interview and the alien established eligibility, or to deny SAW applications filed by applicants who were ineligible for approval. 8 C.F.R. 103.1(n)(2).

shall be judicial review of such a denial [of SAW status] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160(e)(2)(A) and (e)(3)(A). The cited section, 8 U.S.C. 1105a, provides for the exclusive review of an order of deportation in the courts of appeals. See *Foti* v. *INS*, 375 U.S. 217 (1963); *INS* v. *Chadha*, 462 U.S. 919, 938 (1983). Judicial review of the denial of a SAW application is to be based solely on the record established before the administrative appeals authority. The findings of fact and determinations in that record are conclusive absent abuse of discretion or a demonstration that the findings are contrary to clear and convincing facts in the record as a whole. 8 U.S.C. 1160(e)(3)(B). Congress enacted virtually identical provisions for the general legalization program. 8 U.S.C. 1255a(f).

The legalization programs attracted "amnesty" applications on an unprecedented scale. According to information reported to Congress in May 1989, nearly 3.1 million applications were filed under the legalization programs. Of the 1,843,744 applications that had been adjudicated as of May 1989, 95.7% had been approved. In the general legalization program, the approval rate was 96.6%, while in SAW, the approval rate was 92.9%.[2] The INS anticipated that the overall approval rate for the SAW program would decline somewhat as it completed investigation of cases for fraud. *Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 400, 403 (1989) (statement of Alan C. Nelson, INS Commissioner).

[2] 1,768,089 applications were filed under the general legalization program, while 1,301,804 were filed under SAW.

2. Respondents are the Haitian Refugee Center (HRC); the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach, Florida (MRS); and 17 individual aliens whose SAW applications were denied. On June 13, 1988, respondents brought suit against petitioners in the United States District Court for the Southern District of Florida. Respondents alleged that the INS had adopted unlawful policies and practices in making SAW determinations, and that these policies and practices were resulting in erroneous denials of SAW applications.[3] Respondents claimed that these policies and practices violated IRCA and the Due Process Clause. On behalf of themselves and a class consisting of SAW applicants in the Eleventh Circuit who had been or would be denied SAW status because of the alleged unlawful practices, respondents sought declaratory, injunctive, and mandatory relief against the INS prohibiting those practices. App., *infra*, 2a, 19a-20a.

Following a hearing, the district court granted respondents' motion for class certification and for a preliminary injunction. App., *infra*, 55a-57a. Initially, the court held that it had subject matter juris-

[3] In particular, respondents alleged that the INS (1) had imposed an improper burden of proof on applicants by insisting upon corroborating evidence in addition to affidavits submitted by applicants to establish the requisite 90 days of agricultural employment; (2) had improperly denied "nonfrivolous" applications at the LO level, thereby depriving applicants of work authorization pending review of their applications; (3) had issued notices of denial that inadequately described the grounds for denial and provided inaccurate information regarding appeals; and (4) had conducted improper interviews by failing to provide interpreters for applicants, failing to disclose adverse evidence to applicants to permit rebuttal, and refusing to allow applicants to present witnesses in support of their claims. App., *infra*, 19a-20a.

diction over the action, notwithstanding IRCA's specific and limited provisions for judicial review. *Id.* at 36a-40a. The court reasoned that respondents' complaint fell under its general federal question jurisdiction because it did not challenge the INS's determination in any particular case. "[R]ather," the court explained, the complaint "attacks the manner in which the entire program is being implemented." App., *infra*, 38a, citing *Haitian Refugee Center (HRC)* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), and *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985).

The court also rejected petitioners' arguments that the organizational plaintiffs (HRC and MRS) lacked standing to pursue their claims against the operation of the SAW program. App., *infra*, 40a-44a. The court noted that HRC, whose main function is to provide legal representation to Haitian refugees, had alleged a direct injury to its ability to assist the Haitian refugee community, and an indirect injury to its membership. As to MRS, the court noted that it was a "qualified designated entity" under IRCA, authorized to assist in the preparation and submission of applications for SAW status.[4] MRS alleged that the INS's practices, by discouraging aliens from

[4] "Qualified designated entities" were created by IRCA in order to permit aliens to file legalization and SAW applications with nongovernmental intermediaries who would forward the applications to the Attorney General. 8 U.S.C. 1160(b)(1)(A), 1160(b)(2); 1255a(c)(1), 1255a(2). Congress provided for such entities in order to encourage undocumented aliens to apply for legalization without fear of exposure to the INS. H.R. Rep. No. 682, *supra*, Pt. 1, at 73. To that end, the files of such entities relating to an alien being assisted regarding a SAW application are confidential, and the INS lacks access to those files without the alien's consent. 8 U.S.C. 1160(b)(4).

applying for SAW status, had prevented it from performing its mission. *Id.* at 41a.

Turning to respondents' claim for preliminary relief, the court concluded that respondents were likely to prevail on the merits and had satisfied the other requisites for a preliminary injunction. The court therefore entered a detailed preliminary injunction ordering INS, *inter alia*, to vacate the denials issued to certain SAW applicants and remedy the violations that the court believed had affected the determinations in those cases. App., *infra*, 55a-57a.[5] Other paragraphs of the injunction ordered INS to take the following steps with regard to the processing of SAW applications (*id.* at 57a):

> (6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary;
>
> (7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, co-workers, and any other individuals who may offer testimony in support of the applicant;
>
> (8) The interviewers shall be directed to particularize the evidence offered, testimony taken,

[5] The denials that the injunction ordered INS to reopen involved: defective notices of denial; applications denied on the basis of adverse evidence that INS had considered without the applicants' knowledge; and applications determined under an incorrect burden of proof. App., *infra*, 55a-56a. Petitioners did not challenge those paragraphs of the preliminary injunction on appeal (except to the extent that petitioners challenged the district court's jurisdiction). *Id.* at 2a-3a.

credibility determinations, and any other relevant information on the form I-696.[6]

3. Petitioners sought review of paragraphs (6), (7), and (8) of the preliminary injunction in the court of appeals, and challenged the district court's jurisdiction to entertain this action. The court granted a stay of those paragraphs pending appeal, but after briefing and argument, the court of appeals affirmed, holding that the district court had properly exercised jurisdiction over this case and had not abused its discretion in granting a preliminary injunction. App., *infra*, 1a-17a.

The court began by holding that 8 U.S.C. 1160(e) did not preclude the district court from exercising federal question jurisdiction. Stating that it "had previously considered and rejected this argument," the court explained that *HRC* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*, established the propriety of district court jurisdiction to review "allegations of systematic abuses by INS officials." App., *infra*, 9a-10a. Applying the principles announced in those cases, the court said (*id.* at 11a):

> In this action, appellees do not challenge the merits of any individual status determination; rather, like the plaintiffs in *Haitian Refugee Center* v. *Smith* and *Jean* v. *Nelson*, they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights.

[6] The court subsequently granted respondents' motion to compel the INS to produce in discovery up to 20,000 "legalization files" pertaining to the class members, notwithstanding the confidentiality provisions in IRCA protecting against disclosure of such files, see 8 U.S.C. 1160(b)(6). The government's petition for mandamus challenging that order was denied by the court of appeals. *In re Nelson*, 873 F.2d 1396 (11th Cir. 1989) (per curiam).

In addition, the court found inapplicable the exhaustion-of-remedies requirement of 8 U.S.C. 1105a. The court stated that the exhaustion requirement was not triggered because "the individual plaintiffs here do not seek substantive review of any individual ruling respecting their status," but only "challenge the adequacy of the procedures employed in the processing of their SAW application." App., *infra*, 12a. The court further refused to apply prudential exhaustion principles, because it concluded that even if the plaintiffs had pressed their claims through the administrative process, the chances that INS would revise its policies in response to the claims of a single applicant were "remote." *Id.* at 13a (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976)). As to the organizational plaintiffs, the court held that exhaustion was "clearly" inapplicable because they "had no remedy to exhaust." App., *infra*, 11a.

The court also rejected petitioners' argument that the organizational plaintiffs lacked standing. The court believed that petitioners had challenged only the organizations' standing to raise the rights of third parties, but it dismissed that argument because the district court had found that the organizations had a cognizable injury in their own right. App., *infra*, 11a n.10.

Having disposed of the jurisdictional issues, the court of appeals held that the issuance of the preliminary injunction did not constitute an abuse of discretion. The court stated that the right of SAW applicants to apply for temporary residency, and to substantiate their claims to eligibility, must be accorded the protections of due process. Applying the three-factor test of *Mathews* v. *Eldridge*, *supra*, and *Landon* v. *Plasencia*, 459 U.S. 21 (1982), the court upheld the provisions of the injunction requiring INS to provide adequate translators at SAW inter-

views, to permit applicants to call witnesses at such interviews, and to particularize evidence offered, testimony taken, and evidentiary determinations on its forms for such interviews. App., *infra*, 13a-17a.

REASONS FOR GRANTING THE PETITION

This case presents a question of great importance in the governance of the legalization programs mandated by Congress in 1986. The court of appeals held that district courts have jurisdiction to entertain sweeping challenges to the policies and practices employed by INS in administering IRCA. That decision is contrary to the language and structure of IRCA's carefully crafted jurisdictional provisions. The court's decision permits circumvention of the sole avenue for judicial review under IRCA intended by Congress: a petition to a court of appeals for review of an order of deportation. By so holding, the court has sanctioned the improper intervention of federal district courts into the day-to-day business of administering the immigration laws. Moreover, the court of appeals' decision conflicts with the holding of the D.C. Circuit in *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1337 (1989), petition for cert. pending, No. 89-1018, which construed the virtually identical jurisdictional provisions applicable to the general legalization program.

The resolution of this conflict is of intense practical significance to INS. Numerous IRCA cases, based on the same jurisdictional theory as that accepted by the court below, have been filed in district courts around the country. These cases have caused substantial disruption to INS's processing of tens of thousands of legalization applications. Because the decision below undermines the scheme for judicial review embodied in IRCA and fundamentally alters the

balance of responsibilities between the INS and the courts, this Court's review is warranted.[7]

1. a. Congress carefully structured the SAW program to channel all judicial review of INS determinations to the courts of appeals in the review of a deportation order. The statute provides in all-encompassing terms: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. 1160(e)(1). In the following paragraphs,

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[7] Although we do not agree with the court of appeals' analysis in affirming paragraphs (6), (7), and (8) of the preliminary injunction, we are not challenging that aspect of the judgment here. We have determined not to seek review of those holdings because the order at issue was only a preliminary injunction, and further proceedings were contemplated before the district court. Moreover, if our principal contention is accepted—that the district court lacks jurisdiction—further review of the details of the injunction is unnecessary. Nonetheless, we note that the court's affirmance of the injunction seriously misapplied the multifactor analysis set forth in *Mathews* v. *Eldridge*, *supra*, to govern procedural due process claims. In particular, the court gave no consideration to the government interest in retaining the current procedures, and it overrated the risk of error in the "generality of cases" (*Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985)). See App., *infra*, 15a-16a. For example, Congress did not mandate the provision of government-paid interpreters at SAW interviews, apparently believing that the expense was unjustified in light of the size of the program, the probability that most applicants could obtain adequate translation assistance on their own, and the existence of bilingual INS employees. Such an assumption appears to be valid, as over 90% of the SAW applications thus far adjudicated nationwide have been approved. Moreover, the court of appeals failed to recognize the prospect that, because of INS's finite resources, the requirement of providing more "process" for some might force the agency to give less consideration to others. Compare *Mathews*, 424 U.S. at 348.

the subsection spells out precise procedures intended to provide the exclusive method of review. The subsection requires the establishment of "a single level of administrative appellate review," and unequivocally states that "[t]here shall be judicial review of such a denial [of a SAW application] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160 (e)(2)(A) and (e)(3)(A). Section 1105a, in turn, requires that a deportation order be reviewed only in a court of appeals.[8] Congress could hardly have chosen clearer or more forceful language to express its intention to preclude *any* judicial review of a "determination respecting an application" for SAW status, other than in the court of appeals following the entry of a deportation order.

The present action raises claims that are squarely covered by IRCA's jurisdictional provisions, and thus cannot be brought in district court. The complaint alleged that the individual plaintiffs (and the class they sought to represent) were denied SAW status

[8] 8 U.S.C. 1105a was the product of a 1961 amendment to the Immigration and Nationality Act. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. By making applicable the Hobbs Act, 28 U.S.C. 2341 *et seq.*, as the "sole and exclusive" provision for the review of "final orders of deportation," it confers exclusive jurisdiction on the courts of appeals. Congress's purpose in providing for review of "final orders of deportation" in the courts of appeals was "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts." *Foti* v. *INS*, 375 U.S. at 226 (denial of suspension of deportation reviewable under Section 1105a); *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam) (denial of motion to reopen deportation proceedings reviewable under Section 1105a); cf. *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968) (district director's denial of a stay of deportation three months after entry of deportation order not reviewable under Section 1105a).

because of alleged unlawful procedures employed by INS in adjudicating their applications. For example, the plaintiffs alleged that INS imposed an improper burden of proof on SAW applicants; that INS denied SAW applicants the opportunity to present witnesses; that INS failed to furnish translators at government expense; and that INS provided defective notices of denial, hindering the ability of rejected SAW applicants to prosecute an administrative appeal. Complaint, paras. 64, 80-82, 86. Each of these claims directly attacks the process used by INS to make a determination respecting entitlement to SAW status. Hence, they could all have been raised before the INS's Administrative Appeals Unit, which provides administrative review of denials in the legalization programs. See 8 C.F.R. 103.3(a)(2), 210.2(f). The same claims could be raised in the court of appeals in the review of a deportation order. *INS* v. *Chadha*, 462 U.S. at 938 ("the term 'final orders' in [Section 1105a] 'includes all matters on which the validity of the final order is contingent'"). Consequently, respondents' claims are properly characterized as seeking review of a "determination respecting an application" for SAW status—precisely the type of claim that is governed by 8 U.S.C. 1160(e).[9]

[9] Other provisions of IRCA support that conclusion. The statute contemplates administrative review of objections to a denial of SAW status (8 U.S.C. 1160(e)(2)), and, by incorporating 8 U.S.C. 1105a, requires that such administrative remedies be exhausted. The holding below frustrates that objective, as plaintiffs may proceed to federal court without obtaining administrative review of their claims. App., *infra*, 26a. Permitting district court actions also breeds confusion about the appropriate record and standard of review. IRCA specifically designates the record for judicial review, and formulates a highly restrictive standard for reversal to be

Although respondents claimed to attack only a pattern or practice of conduct independent of particular cases, the relief that the complaint requested, and that the court granted, belies that claim. The complaint sought, in addition to prospective changes in INS procedures, an order requiring INS "to set aside all denials of SAW applications filed by Plaintiffs and members of the class they seek to represent who are subject to the practices, policies, and procedures addressed in this complaint," and "to reconsider all [such] SAW applications." Complaint, Prayer for Relief, paras. D(8)-D(9). Likewise, the district court ordered the INS to vacate some notices of denial, to reconsider other denials, and to afford still other applicants new opportunities to submit evidence. App., *infra*, 56a.

Such individualized relief makes manifest that the complaint's purpose was to achieve, on a mass scale, review and reversal of the INS's denials of SAW applications in particular cases. That reading of the complaint is no less accurate simply because respondents stopped short of asking that any applicant actually be granted SAW status by the court. The complaint simply combined many individual procedural claims, none of which was cognizable individually in district court, into one composite claim. But claims that are jurisdictionally barred individually cannot be salvaged simply by combining them into a class action. See *Snyder* v. *Harris*, 394 U.S. 332 (1969) (aggregation of claims not permitted for purposes of the jurisdictional-amount requirement in a class action founded on diversity jurisdiction).

In an analogous context, this Court has rejected arguments that individual plaintiffs can bypass re-

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applied by the courts of appeals. 8 U.S.C. 1160(e)(3)(B). The district court in this case ignored that standard in requiring the INS to reopen thousands of SAW applications.

strictions on judicial review by purporting to attack general policies rather than individual results. In *Heckler* v. *Ringer*, 466 U.S. 602 (1984), three plaintiffs had undergone a form of surgery and had unsuccessfully pursued a claim for reimbursement from the Secretary of Health and Human Services through some, but not all, layers of administrative review. A fourth plaintiff had not undergone the surgery at all, but claimed that the Secretary's refusal to allow payment for that type of surgery precluded him from obtaining it. All sued in district court to challenge the Secretary's reimbursement policy, although the applicable statute provided that judicial review was available only after the Secretary rendered a "final decision" on a particular claim.

Like the respondents here, the plaintiffs in *Ringer* contended that their suits were permissible because they challenged only the Secretary's " 'procedure' for reaching her decision," not the underlying decisions on their benefits claims. 466 U.S. at 614. This Court rejected the purported distinction. As to the three plaintiffs who were in the midst of the administrative process, the Court said that "it makes no sense to construe the claims * * * as anything more than, at bottom, a claim that they should be paid for their * * * surgery." *Ibid.* Explaining that the procedural challenges were "inextricably intertwined" with the underlying benefits claim, the Court concluded that "all aspects of respondents' claim for benefits should be channeled first into the administrative process which Congress has provided for the determination of claims for benefits." *Ibid.* The Court expressly rejected the view that "simply because a claim somehow can be construed as 'procedural,' it is cognizable

in federal district court by way of federal-question jurisdiction." *Ibid.*[10]

Just as the claimants in *Ringer* sought to evade the judicial review provisions of the Medicare Act by casting their challenge as a procedural one, respondents here sought to avoid the force of Section 1106(e) by contending that they were challenging only policies and practices of the INS, not any determinations respecting their applications for SAW status. That distinction is untenable. The procedures challenged by respondents are integral parts of INS's determinations of eligibility. The burden of proof, the ability to call witnesses, and the presence of translators all concern the process by which a particular claim is adjudicated, a process that takes on meaning only because of the outcome it produces. Such procedures can readily be challenged in an administrative appeal and, ultimately, in a court of appeals in the review of a deportation order; hence, review of those procedures in district court is precluded by IRCA. Because the courts of appeals have jurisdiction over such matters, this is not a case where district court jurisdiction is required in order to avoid construing IRCA to preclude all judicial review. Compare *Webster* v. *Doe*, 486 U.S. 592, 603

[10] The Court was equally emphatic in rejecting the arguments by the plaintiff who had never even submitted a claim for benefits, and who simply wanted to challenge the formal rule issued by the Secretary that would preclude reimbursement. 466 U.S. at 620-621. The Court explained: "Although it is true that Ringer is not seeking the immediate payment of benefits, he is clearly seeking to establish a right to future payments should he ultimately decide to proceed with * * * surgery." *Id.* at 621. The Court rejected such a preemptive attack on the Secretary's rule, because the alternative "would allow claimants substantially to undercut Congress' carefully crafted scheme for administering the Medicare Act." *Ibid.*

(1988); *Lindhahl* v. *OPM*, 470 U.S. 768, 778 (1985).[11]

The court also erred in upholding the district court's jurdisdiction over the claims of the organizational plaintiffs. MRS predicated its right to sue on its status as a "qualified designated entity," which the statute charged with assisting applicants. It claimed that the INS's conduct discouraged eligible applicants from filing applications and thereby prevented MRS from performing its mission under IRCA. HRC simply claimed injury to itself because of an impairment of its ability to assist its members and the diversion of its resources. Complaint, paras. 17-18; App., *infra*, 41a.[12] Organizations such as MRS

[11] For that reason, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), is not relevant here. In that case, the Court held that notwithstanding provisions barring all judicial review of individual Medicare Part B *claims*, a district court challenge to *regulations* under Part B was permissible. The paramount consideration in that context was that absent such a challenge to the regulations, there would have been no judicial review of them at all. *Id.* at 670-676. Nor is this a case like *UAW* v. *Brock*, 477 U.S. 274 (1986), where the Court upheld the standing of a union (on behalf of its members) to challenge the Department of Labor's guidelines governing an unemployment benefits scheme. There, the applicable statute said that benefits determinations were to be made by a cooperating state agency and were reviewable only as provided under state law. The Court held that a district court challenge to the federal guidelines was permissible because the union did not seek benefits for any particular claimant. *Id.* at 284-285. *Brock* is distinguishable because the statute considered there was passed against a backdrop of prior Supreme Court decisions recognizing the availability of federal review under similar statutory schemes; moreover, the language restricting judicial review in the particular statute applied only to determinations by the state agency, not by the Department of Labor.

[12] HRC also claimed indirect injury because of adverse effects on its membership. Complaint, para. 17. Any such claim

and HRC, of course, cannot obtain review of the operation of the SAW program by raising claims in a petition for review of an order of deportation. But far from suggesting that such organizations are free to bring district court challenges to substantive or procedural aspects of the SAW program (unencumbered by the need to exhaust administrative remedies), the absence of a provision giving such parties judicial recourse suggests that Congress did not intend to authorize them to mount such challenges at all.

"[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Although there is ordinarily a presumption favoring judicial review, it is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351 (quoting *Data Processing Service* v. *Camp*, 397 U.S. 150, 157 (1970)). See also *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). In *Block*, this Court applied those principles in rejecting a claim that consumers could challenge administrative milk-handling orders free from the exhaustion requirements applicable to milk producers and handlers, the parties subject to those orders. The absence of any express provision for consumers to raise such challenges, the detailed scheme governing challenges by other parties, and the overlap of the consumers' interest with that of other parties supported the view that Congress had not intended to permit judicial

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of representative standing, however, depends on a showing that the members themselves could sue. *UAW* v. *Brock*, 477 U.S. at 282.

review at the instance of consumers. The same principles are applicable here.

Although Congress provided for "qualified designated entities" in order to encourage aliens to come forward and apply for legalization, it did not designate them as litigation agents for aliens. Far less did Congress identify any role under IRCA for a group, like HRC, that simply seeks to assist aliens. To allow either group to sue would vastly enlarge the range of possible lawsuits involving IRCA, while frustrating the contemplated layer of administrative review within the INS. For example, many of the procedural objections made in this case could be resolved administratively by appeals from individual applicants, without the need for judicial intervention. It would obviously undermine the statutory scheme to accord organizational plaintiffs such as MRS and HRC a right to immediate and unrestricted judicial review under the SAW program. IRCA was not designed for the benefit of those organizations, and it affords them no special protection. Moreover, their claims simply duplicate the claims of applicants. Under these circumstances, the court of appeals erred in allowing the organizational plaintiffs to sue.[13]

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[13] Contrary to the court of appeals' apparent view, the question is not simply whether HRC and MRS have constitutional standing under Article III. See App., *infra*, 11a n.10, citing *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982). *Havens Realty* merely found that an organization's impaired ability to counsel its members satisfied the Article III requirement of injury-in-fact. *Id.* at 378-379. IRCA, however, manifests a far more restrictive approach to judicial review than the constitutional minimum examined in *Havens Realty*. And, as "congressional preclusion of judicial review is in effect jurisdictional," *Block*, 467 U.S. at 353 n.4, the conclusion that Congress did not intend to authorize suit by the organizational plaintiffs means that the district court was without subject matter jurisdiction to hear their complaint.

b. The legislative history and background against which IRCA was enacted are fully consistent with the natural interpretation of Section 1160(e)'s language. The Senate precursors to IRCA would have gone farther than the statute later enacted by precluding all judicial review of decisions or determinations involving the legalization program.[14] The Senate Report on a 1985 bill, explaining the rationale underlying such a complete prohibition of judicial review, noted that since the legalization program was of a "magnitude * * * unique in history," it would require a "major managerial effort * * * to review the applications and assure that applicants qualified to be legalized will actually receive this benefit and that other applicants will not." S. Rep. No. 132, *supra*, at 48. Concerned about the incentives and opportunity of ineligible applicants to delay the disposition of their cases and derail the program, the Committee stated that the purpose of precluding all

[14] A Senate bill introduced in the 98th Congress expressly prohibited all judicial review. See S. 529, 98th Cong., 1st Sess., § 301(a) (1983) ("No decision or determination made by the Attorney General under this section may be reviewed by any court of the United States or of any State."); S. Rep. No. 62, 98th Cong., 1st Sess. 53 (1983). Senator Cranston supported an amendment much like the provision later enacted in IRCA. He described it as providing a "very limited form of judicial review that would not expand the burden of the courts." Rather, "[i]t would be available only when an improper denial of legalization is raised as a defense in a deportation proceeding." 129 Cong. Rec. 12,810-12,811 (1983) (remarks of Sen. Cranston). That amendment was rejected. *Id.* at 12,837. Although both the Senate and the House passed immigration reform bills in the 98th Congress, their conflicting provisions were not reconciled and no final bill was enacted. The Senate bill that passed in the 99th Congress also precluded judicial review, but the House version containing the present language prevailed in conference, see note 15, *infra*.

judicial review was "to insure reasonably prompt final determinations" so that dilatory tactics could not interfere with "the expeditious operation of the program for others." *Ibid.*[15]

Although the legislation ultimately enacted provided for limited judicial review, Congress did not intend to open the door to the kind of action brought here. As the House Committee Report explained, "[t]he bill provides for limited administrative and judicial review of denials of applications for legalization. * * * [T]he applicant can appeal a negative decision within the context of judicial review of a deportation order." The sectional analysis of the bill confirms that the provision governing review in the SAW program "[r]estricts judicial review to the context of review of an order of exclusion or deportation." H.R. Rep. No. 682, *supra*, Pt. 1, at 74, 99.

Given the size of the undertaking involved in the legalization programs, the restrictions on judicial review serve an important purpose. According to Congressional Budget Office estimates in 1985, as many as 5.6 million undocumented aliens lived in the United States, and as many as 565,000 would apply for legalization. S. Rep. No. 132, *supra*, at 64. The legalization program was described as "a 'one-time-only' program to address a problem resulting

[15] The bill in question, which would have established a general legalization program, provided for "no * * * judicial review (by class action or otherwise) of a decision or determination under this section." S. 1200, 99th Cong., 1st Sess., § 202(f) (1985). Although S. 1200 passed the Senate, the House version, H.R. 3810, 99th Cong., 2d Sess. (1986), which provided for limited judicial review, was accepted in conference. See H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 92, 95-96 (1986) (noting the selection of the House legalization provisions without explanation and without reference to judicial review provisions).

from the large-scale illegal immigration of the past." *Id.* at 16. In light of the obvious logistical and practical problems in implementing such a program, Congress had to balance fairness for individual applicants against the need for overall efficiency in implementing the program for the benefit of all applicants. There is no evidence that, in effecting a compromise allowing limited judicial review in the courts of appeals in the context of deportation proceedings, Congress envisioned that district courts would have the power (and obligation) to supervise the processing of thousands of legalization applications under the aegis of reviewing INS "policies and practices."

c. In rejecting petitioners' jurisdictional arguments, the court below never analyzed the language used by Congress in limiting judicial review. Instead, the court relied on two court of appeals precedents that purportedly created a "pattern and practice" exception to 8 U.S.C. 1105a. App., *infra*, 9a-11a, citing *HRC* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*. While we believe those cases were wrongly decided, they are in any event not controlling here, as neither case involved the distinctive statutory framework governing judicial review under IRCA.

In *HRC*, a class action was filed on behalf of over 4,000 Haitians who claimed that INS was improperly expediting their asylum claims in violation of their statutory and constitutional rights. INS contended that Section 1105a, which governs judicial review of all final orders of deportation and determinations incident thereto, precluded the assertion of the plaintiffs' claims in district court. 676 F.2d at 1032. Although finding INS's argument to have "surface appeal," the court rejected it, reasoning that an INS "pattern and practice" of violating the constitutional rights of aliens raised a "separate matter" from any individual case, and was "independently cognizable

in the district court under its federal question jurisdiction." *Id.* at 1033.

In *Jean* v. *Nelson*, the court of appeals relied on the same jurisdictional theory. There, a class of Haitian refugees who were in the midst of exclusion proceedings sued in district court claiming that they had been denied notice of their right to apply for asylum. Although Section 1105a permits aliens to challenge only final orders of exclusion after exhaustion of administrative remedies, the court concluded that those requirements were not applicable.[16] The court accepted the distinction drawn in *HRC* between "an individual challenge on a preliminary procedural matter," which was barred by Section 1105a, and "allegations of widespread abuses by immigration officials," which could be heard in district court under 28 U.S.C. 1331. 727 F.2d at 980 & n.32. In the latter case, the court said, because the legal issues affect "an entire class of aliens," the purposes of postponing judicial review until after the entry of individual final orders (the avoidance of delay and "procedural redundancy") would not be served. *Ibid.*

In our view, both *HRC* and *Jean* err in announcing that the district courts have power to adjudicate claims that Congress has said may be heard only in another forum or at another time. It is a fundamental principle of our judicial system that the jurisdiction of the lower federal courts is governed by statute. *Finley* v. *United States*, 109 S. Ct. 2003, 2006

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[16] The immigration laws distinguish between "excludable" aliens, who have not made an entry into the United States, and "deportable" aliens, who have entered although they may have done so unlawfully. See *Landon* v. *Plasencia*, 459 U.S. at 25-27. Different administrative proceedings are applicable to each category, *ibid.*, and an order of exclusion is reviewable exclusively in district court in a petition for habeas corpus. 8 U.S.C. 1105a(b).

(1989); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850). District courts cannot assume the power to hear cases simply because it may seem wise, efficient, or prudent to do so. While the court in *HRC* said that district courts may draw upon their "equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged," 676 F.2d at 1033, and *Jean* extended that principle to statutory claims, 727 F.2d at 980 n.32, this Court has only recently reaffirmed the longstanding principle that such equitable powers cannot override restrictions imposed by statute. *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988). *HRC* and *Jean* advance various policy reasons for short-circuiting the scheme for judicial review reflected in Section 1105a, but fail to reconcile their analysis with the language and meaning of the statute.[17]

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[17] When Congress has specified a particular review mechanism, courts are not free to fashion alternatives to the specified scheme. See *United States* v. *Fausto*, 484 U.S. 439 (1988); *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 419-422 (1965); *Yakus* v. *United States*, 321 U.S. 414 (1944). In particular, when Congress specifies that judicial review of agency action shall be had in the courts of appeals, district courts cannot assert jurisdiction to review the same actions. *FCC* v. *World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("Litigants may not evade these provisions [requiring review of FCC orders in the court of appeals] by requesting the District Court to enjoin action that is the outcome of the agency's order."). See also *Public Utilities Comm'r* v. *Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (Kennedy, J.) ("where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review"); *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute").

But even accepting the *HRC-Jean* approach as to Section 1105a, there is still no warrant for extending that approach to IRCA. In IRCA, Congress employed language even broader than that in Section 1105a, expressly limiting review of all claims "respecting an application" under the SAW program to petitions for review of an order of deportation. This incorporates the judicial review apparatus applicable to deportation cases, but goes farther by adding an explicit prohibition on any other form of judicial review. Consequently, if there had been any doubt about the result under Section 1105a standing by itself, Congress removed it. The sole source of judicial power to review determinations respecting the denials of SAW applications is found in 8 U.S.C. 1160(e). If that section does not afford a basis for review—and it clearly does not authorize district court actions—a district court case must be dismissed for want of judicial power.[18]

2. The decision below conflicts with a decision of the United States Court of Appeals for the District of Columbia Circuit. In *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018, the court of appeals, applying virtually identical jurisdictional provisions in IRCA, held that the district courts lack jurisdiction to hear challenges to INS rules governing eligibility for adjustment of status under the general legalization program.

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[18] That conclusion applies equally to the grant of general federal question jurisdiction under 28 U.S.C. 1331 and to the provision in the immigration laws giving jurisdiction to the district courts for "all causes, civil and criminal, arising under any of the provisions of this subchapter." 8 U.S.C. 1329. The grant of general jurisdiction under those provisions does not override the more specific limitations set forth in IRCA. Cf. *Whitney Bank* v. *New Orleans Bank*, *supra*.

In that case, as here, individuals and organizations that advise aliens challenged in district court certain INS policies regarding the administration of the legalization program under IRCA.[19] Under 8 U.S.C. 1255a(f), the judicial review "of a determination respecting an application for adjustment of status" in the legalization program may be had "only in the judicial review of an order of deportation under Section 1105a of this title." The plaintiffs argued that their challenge to a rule or policy was not controlled by that language. Rejecting that argument, the D.C. Circuit stated: "While some courts have found that allocation of jurisdiction appropriate under the judicial review provisions of [8 U.S.C. 1105a], apparently because they believed the only purpose of exclusive court of appeals jurisdiction was to prevent piecemeal litigation by aliens in the district courts that would delay deportation, we do not believe Congress intended that result under IRCA." 880 F.2d at 1331 (citation omitted).

The *Ayuda* court explained that a since a regulation governing eligibility will affect the outcome of many individual applications, "the regulation embodies determinations that will impact, and therefore

[19] The challenge in *Ayuda* arose from INS's interpretation of the eligibility requirements under the general legalization program. IRCA requires an alien to establish his continual unlawful residence in the United States since January 1, 1982. 8 U.S.C. 1255a(a)(2)(A). For nonimmigrant aliens (those who entered under a visa not entitling them to permanent residency, see 8 U.S.C. 1101(a)(15)), the alien must establish (unless his visa had expired through the passage of time) that he had violated the conditions for lawful status and that this was "known to the Government." 8 U.S.C. 1255a(a)(2)(B). The INS issued regulations that construed the term "Government" to mean the INS. 8 C.F.R. 245a.1(d). The plaintiffs contended that "Government" required a broader reading. *Ayuda*, 880 F.2d at 1327.

are 'respecting,' future applications." 880 F.2d at 331. Consequently, the plain language of Section 1255a(f)(1) (the counterpart to Section 1160(e) for the general legalization program) covers challenges to rules. Moreover, the court noted, permitting review of rules in district court would lead to a "rather peculiar" division of jurisdiction, because the courts of appeals would hear "only the application of the statute in presumably less important individual cases," while district courts would review "the much more important cases involving broad questions of statutory construction that would apply to a whole class of aliens." 880 F.2d at 1331-1332. Taking note of the precise and limited standard of review that Congress established in IRCA, the court added that it "seems inconceivable" that Congress would have closely cabined court of appeals review of INS regulations as applied to particular cases, but would have authorized full-scale APA challenges to such rules in district court. *Id.* at 1333. The court concluded that since an alien could later contest the validity of regulations in the fashion set forth in IRCA—in review of a deportation order—"it follows that the district court lacked jurisdiction to hear the same claim in a different forum." *Ibid.* The court also held that the organizational plaintiffs could not invoke the district court's jurisdiction, because to allow such actions would undermine IRCA's jurisdictional scheme. *Id.* at 1339-1340.[20]

[20] The court of appeals also relied on an alternative ground, namely, that the agency action under review was not ripe. 880 F.2d at 1341-1346. Chief Judge Wald dissented in *Ayuda*, *id.* at 1346-1367, believing that the district court had properly exercised jurisdiction, and that the INS's actions were ripe for review. The D.C. Circuit denied rehearing en banc, with Chief Judge Wald, and Judges Mikva, Edwards, and Ruth

The *Ayuda* decision dealt with the same jurisdictional language as that applicable to the SAW program. Compare 8 U.S.C. 1160(e) (SAW) with 8 U.S.C. 1255a(f) (general legalization program). Although *Ayuda* involved review of a regulation (as opposed to the challenge to "policies and practices" here), the same principles are controlling in both situations. In both cases, the core inquiry is whether Congress intended to permit district court review of challenges to general policies adopted by INS in administering the legalization programs. The *Ayuda* court's answer to that question is precisely contrary to that of the decision below.

3. The resolution of the jurisdictional issue is of practical significance to the INS. Apart from this case and *Ayuda*, nearly 30 other cases have been filed in district courts across the county to challenge INS rules and policies under the legalization programs. See, *e.g.*, *Doe* v. *Nelson*, 703 F. Supp. 713, 720-722 (N.D. Ill. 1988); *Zambrano* v. *Thornburgh*, No. S-88-455 EJG (E.D. Cal. Aug. 9, 1988), appeal pending, Nos. 88-15438, 88-15533 (9th Cir.); *Catholic Social Services* v. *Thornburgh*, No. S-86-1343-LKK (E.D. Cal. June 10, 1988), appeal pending, Nos. 88-15046, 88-15127, 88-15128 (9th Cir. argued Nov. 18, 1988); *LULAC* v. *INS*, No. 87-4757-WDK (C.D. Cal. 1988), appeal pending, No. 88-6447 (9th Cir.); *Immigrant Assistance Project* v. *INS*, 709 F. Supp. 998 (W.D. Wash. 1989), appeal pending, Nos. 89-35345, 89-35593 (9th Cir.). In many of these cases, the district court expressly found jurisdiction on the same theory espoused by the court below.

These cases have deeply intruded upon INS's functions under IRCA. Some courts (like the district

B. Ginsburg stating that they would have reheard the case en banc. Order, No. 88-5226 (Oct. 4, 1989).

court in *Ayuda*) have ordered detailed revision of the INS's rules; other courts, despite Congress's express provision for a one-year application window, have purported to extend the deadline for aliens to apply for legalization (*Catholic Social Services*, *supra*; *LULAC*, *supra*); still others (like the court below) have ordered the reopening of thousands of applications to correct purported procedural errors in their processing. INS has been compelled to defend itself in complex class actions around the country, often having to address the same legal issue in different cases pending simultaneously. Discovery and fact finding involving legalization issues have been particularly intrusive.[21] Moreover, the INS has been forced to respond to the plaintiffs' discovery requests for information deriving from legalization applications despite IRCA's strict confidentiality provisions. See 8 U.S.C. 1160(b)(6), 1255a(c)(5); note 6, *supra*. Above all, the district courts' micromanagement of the INS has distracted it from performing the task Congress entrusted to the Attorney General: administration of the legalization effort.

Although the legalization programs have largely concluded their first phase, we believe that the issues raised here warrant this Court's attention. Several large cases (including this one) are still pending, and tens of thousands of legalization applications may be affected by their outcome. In addition, the second phase of the legalization process (involving perma-

[21] For example, the district court in *Ayuda* appointed a Special Master to conduct a hearing designed to determine whether aliens had been deterred from applying for legalization because of INS's improper "known to the government" standard. Concerned by the potential burden of conducting such hearings, the government petitioned for mandamus, but the petition was denied. *In re Thornburgh*, 869 F.2d 1503 (D.C. Cir. 1989).

nent residency) is underway and may engender similar lawsuits. More fundamentally, provisions that define and limit opportunities for judicial review are a common feature of many statutory schemes. Clarifying the proper role of the courts in schemes like the present one thus has continuing significance, for "[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley* v. *United States*, 109 S. Ct. at 2010. The litigation under IRCA has demonstrated that such clarity has not yet been achieved. Review of the decision below is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 88-5934

HAITIAN REFUGEE CENTER, INC., a not-for-profit corporation, ROMAN CATHOLIC DIOCESE OF PALM BEACH, MARIE GIZELE ANGRAND, GERMAINE CADET, ROSITA DELVA, DIEUMERCIE DESIR, JOSEPH SAINTIL DIEUDONNE, GERARD HENRY, MARIE FRANCE JEAN-PHILIPPE, NOVAMISE JULIEN, FRANCKLIN JOSEPH, SYLVIA LINDOR, PLAINTIFFS-APPELLEES

v.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, PERRY RIVKIND, District Director, Immigration and Naturalization Service, District Office Number 6, KENNETH PASQUARELL, District Director, Immigration and Naturalization Service, District Office Number 26, WILLIAM CHAMBERS, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, RICHARD NORTON, Associate Commissioner of Examination, Immigration and Naturalization Service, DEFENDANTS-APPELLANTS

May 23, 1989

Appeal from the United States District Court
for the Southern District of Florida

Before RONEY, Chief Judge, VANCE, Circuit Judge, and KAUFMAN *, Senior District Judge.

VANCE, Circuit Judge:

This action was filed on June 13, 1988 on behalf of the Haitian Refugee Center, the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach, Florida, and seventeen applicants for temporary residence under the Special Agricultural Worker ("SAW") program provided for in section 210 of the Immigration and Nationality Act ("INA") (codified as amended by the Immigration Reform and Control Act of 1966 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359, 3417 at 8 U.S.C. § 1160 (Supp. 1986)). Plaintiffs sought declaratory, mandatory and injunctive relief for themselves and a class of persons who have applied for or who will apply for temporary lawful residence status under the SAW program and who have been denied or who will be denied SAW status as a result of defendants' allegedly unlawful practices.[1]

Plaintiffs contend that a number of system-wide practices employed by INS officials in processing applications resulted in the improper denial of thousands of applications for SAW status. After an extensive hearing at which the parties presented testimony and offered evidence the district court certified the plaintiff class, ruled that it had jurisdiction and granted plaintiffs' motion for preliminary injunction. The court's order requires defendant to reopen cases in which: (1) the notices of denial were defective;

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* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

[1] Appellants, who were defendants below, do not challenge the propriety of the class certification.

(2) the INS considered evidence adverse to the applicant without the applicant's knowledge; and (3) the application was adjudicated under an incorrect burden of proof. Appellants do not challenge these provisions of the district court's order. They take issue only with paragraphs (6) through (8) of the injunction, which provide:

> (6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary;
>
> (7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, coworkers, and any other individual who may offer testimony in support of the applicant;
>
> (8) The interviewers shall be directed to particularize the evidence offered, testimony taken, credibility determinations, and any other relevant information on the form I-696.

Haitian Refugee Center, Inc. v. Nelson, 694 F.Supp. 864, 881 (S.D.Fla.1988). Appellants also contend that the district court lacked jurisdiction.

I. Statutory Background

The Special Agricultural Workers program was promulgated as part of the Immigration Reform and Control Act of 1986. The law establishes a seven-year program for the adjustment and admission of foreign agricultural workers to meet the special labor needs of American growers of perishable commodities. *See* H.R.Conf. Rep. No. 99-1000, 99th Cong., 2d Sess. 95, *reprinted in* 1986 U.S.Code Cong. & Admin.News

5649, 5840, 5850-51. The program directs the Attorney General to adjust the status of any qualifying alien admitted for temporary residence. To be eligible for the program, the alien must have applied for adjustment between June 1, 1987 and November 30, 1988 and establish that she is otherwise admissible to the United States as an immigrant. She is further required to demonstrate that she has resided in the United States and has performed seasonal agricultural services for at least ninety man-days during the twelve-month period ending on May 1, 1986. *See* 8 U.S.C. § 1160(a)(1). An alien who is granted temporary residence under the SAW program is ultimately eligible for admission as a permanent resident. Id. § 1160(a)(2).

The application process begins at the local Legalization Office ("LO") of the INS. The LO reviews each application for completeness and conducts an interview of the applicant. 8 C.F.R. § 210.2(c)(2)(iv). Based on the interview, the adjudicator may deny the application or make a recommendation that the application be approved or denied. Where a recommendation is made, the reasons for the recommendation are recorded on the "I-696" worksheet, which accompanies the application through the remainder of the process. The completed case file is then forwarded to one of four regional processing facilities ("RPF") for final review and decision. 53 Fed.Reg. 10065 (to be codified at 8 C.F.R. § 210.1(p)). A denial of the application by either the LO or the RPF may be appealed to the Administrative Appeals Unit. 8 C.F.R. § 103.3(a)(2)(iii).[2] The

[2] When the LO, the RPF or the AAU denies a SAW application the adjudicator must give the applicant written notice setting forth the reasons for denial. 8 C.F.R. § 103.3(a)(2).

Administrative Appeals Unit is the final level of administrative review, *id;* judicial review of an application for SAW status is available only in the context of review of an alien's exclusion or deportation order. 8 U.S.C. § 1160(e)(3).

At the LO, the interviewing officer must determine whether a completed application is "nonfrivolous." *Id.* § 1160(d)(2).[3] The regulations initially restricted denial at the LO level to cases where "the alien clearly fails to meet statutory requirements or the alien admits fraud or misrepresentation in the application process." 8 C.F.R. § 103.1(n)(2). On March 29, 1988 the regulations were amended to permit district directors at the LO level to deny all ineligible applications to ensure that provisional employment authorization is not issued inappropriately. *See* 53 Fed.Reg. 10062, 10064 (1988).

In the case of denial by the LO or the RPF the notice must inform the applicant of the availability of review and procedures for appeal. *Id.*

[3] The regulations provide that a

> complete application will be determined to be nonfrivolous at the time the applicant appears for an interview at the legalization or overseas processing office if it contains: (1) Evidence or information which shows on its face that the applicant is admissible to the United States or, if inadmissible, that the applicable grounds of excludability may be waived under the provisions of section 210(c)(2)(i) of the Act, and (2) evidence or information which shows on its face that the applicant performed at least 90 man-days of employment in seasonal agricultural services during the twelve-month period from May 1, 1985 through May 1, 1986, and (3) documentation which establishes a reasonable inference of the performance of the seasonal agricultural services claimed by the applicant.

8 C.F.R. § 210.1(j).

The SAW applicant must prove by a preponderance of the evidence that she worked the requisite ninety man-days [4] of seasonal agricultural services. She may meet this burden by "producing sufficient evidence to show the extent of that employment as a matter of just and reasonable inference." 8 U.S.C. § 1160(b)(3)(B)(iii). The burden then shifts to the Attorney General "to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be drawn from the evidence." *Id.* To meet her burden of proof, the applicant must present evidence of eligibility independent of her own testimony. 8 C.F.R. § 210.3(b)(2). "Affidavits and personal testimony by an applicant which are not corroborated, in whole or in part, by other credible evidence (including testimony of persons other than the applicant) will not serve to meet an applicant's burden of proof." 8 C.F.R. § 210.3(b)(3). Where the applicant's employer or labor contractor has met its statutory obligation to maintain proper payroll records,[5] the applicant may meet her burden of proof through production of these records. 8 U.S.C. § 1160(b)(3)(B)(ii). The burden may also be met through the submission of affidavits "by agricultural producers, foremen, farm labor contractors, union officials, fellow employees, or other persons with specific knowledge of the applicant's employment." 8 C.F.R. § 210.3(c)(3). The affiant must furnish "a certified copy of corroborating evidence or state the affiant's willingness to personally verify the information provided." *Id.*

[4] The regulations provide that

> The term 'man-day' means the performance during any day of not less than one hour of qualifying agricultural employment for wages paid. If employment records relating to an alien applicant show only piece rate units completed, then any day in which piece rate work was performed shall be counted as a man-day. Work for more than one employer in a single day shall be counted as no more than one man-day for the purposes of this part.

8 C.F.R. § 210.1(i).

[5] As the district court noted, legislation such as the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872, requires employers and farm labor contractors to maintain payroll and employment records. Violations of these requirements, however, are common. *See Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. at 869 n. 10.

II. Facts

The interview at the LO constitutes the only face to face encounter between the applicant and the INS allowing for the assessment of the applicant's credibility. The credibility of the applicant is particularly important where documentary evidence of the applicant's employment history is lacking. As the district court recognized, agricultural employers and labor contractors often fail to maintain accurate employment records. *See infra* n. 5. Workers are frequently paid in cash by labor contractors whose lists of employees are incomplete.[6]

Despite the importance of the interview, the INS does not record or prepare a transcript. In cases involving inadequate documentation of work history,

[6] As the district court noted, the fear of sanctions for noncompliance with federal laws underlies employers' and labor contractors' reluctance to keep accurate records. Labor contractors sometimes fear they will be subject to liability for violation of statutes designed to protect farm workers. In some instances, contractors and employers fear they will be liable for back social security and unemployment insurance taxes. *See id.* at 869-70.

the I-696 worksheet frequently includes the only factual findings on which the RPF bases its decision. These worksheets, however, often contain very little information about the interview. The worksheets of appellees Angrand and Dieudonne, for example, who were recommended for approval by the LO and were denied without explanation by the RPF, were completely blank.

The regulations contemplate the presentation of witnesses in support of an alien's application. "Affidavits and other personal testimony by an applicant which are not corroborated, in whole or in part, by other credible evidence (including testimony of persons other than the applicant) will not serve to meet an applicant's burden of proof." 8 C.F.R. § 210.3(b)(3). When affidavits of persons knowledgeable about the applicant's employment history are offered, *see* 8 C.F.R. § 210.3(c)(3), the regulations require the affiant to furnish "a certified copy of corroborating records *or* state [his] willingness to personally verify the information provided." *Id.* (emphasis added). The district court found that during the first months of the program, affidavits sufficed to corroborate the applicants' claims of employment. *Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. at 871. Suspicion of widespread fraud in the application process, however, led to the LO's decision to deny many applications accompanied only by affidavits.[7] These develop-

[7] Prior to the application period, a form affidavit was developed for use by applicants to meet the burden of proof. The I-705 "Affidavit Confirming Seasonal Agricultural Employment of an Applicant for Temporary Residence Status Under Section 210 of the Immigration and Nationality Act" states that the affiant is "willing to personally confirm this information if requested' and is to be signed under penalty

ments enhanced the importance of live witnesses to the application process. Testimony at trial suggested that although the INS's general policy is to permit the testimony of witnesses, on some occasions applicants had been prevented from presenting witness [*sic*] in their behalf. There was also evidence that some LOs disallowed witness testimony as a rule.

Few applicants for SAW status speak English. An INS survey of applications received in the Miami district between August 1 and August 24, 1988 indicated that ninety percent of applicants spoke either Spanish or Haitian Creole. The INS does not provide interpreters at SAW interviews; some LOs, however, have bilingual employees who assist non-English speaking applicants. The INS does not investigate the qualifications of interpreters provided by the applicants. The record of the interview neither identifies the name of the interpreter nor indicates whether an interpreter was used.

III. Jurisdiction

Appellants challenge the district court's assertion of jurisdiction on the ground that under section 210 of the INA the courts of appeals have exclusive jurisdiction over "determination[s] respecting" a SAW application.[8] We have previously considered and rejected

of perjury. *See Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. at 871; 52 Fed.Reg. 16195 (1987).

[8] Section 210(e)(1) provides that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. § 1160(e)(1). Section 210(e)(3) states that "[t]here shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation" under section 106 of

this argument. In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), we concluded that because plaintiffs' complaint, which challenged the INS's accelerated procedures for processing asylum requests, addressed "matters alleged to be part of a pattern or practice by immigration officials to violate the constitutional rights of a class of aliens," plaintiffs' claims were "independently cognizable in the district court under its federal question jurisdiction." *Id.* at 1033. In *Jean v. Nelson*, 727 F.2d 957 (11th Cir.1984) (in banc), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), we reaffirmed that section 106 of the INA (Codified at 8 U.S.C. § 1105a) does not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials. *Jean*, 727 F.2d at 980. We explained that to postpone "judicial resolution of a disputed issue that affects an entire class of aliens until an individual

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the INA. 8 U.S.C. § 1160(e)(3). Section 106(a) vests jurisdiction in the courts of appeals and provides that:

> The procedure prescribed by, and all the provisions of Chapter 158 of Title 28 [28 U.S.C. §§ 2341-2353], shall apply to, and shall be the *sole and exclusive* procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—
>
> . . . .
>
> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

8 U.S.C. § 1105a(a), (c) (emphasis added).

petitioner has an opportunity to litigate it on habeas corpus would foster the very delay and procedural redundancy that Congress sought to eliminate in passing § 1105a." *Id.* In this action, appellees do not challenge the merits of any individual status determination; rather, like the plaintiffs in *Haitian Refugee Center v. Smith* and *Jean v. Nelson*, they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights.[9]

Appellants also contend that review of plaintiffs' claims was precluded by their failure to exhaust administrative remedies. This argument is clearly inapposite as applied to the organizational plaintiffs, who had no remedy to exhaust.[10] *See Ayuda, Inc. v.*

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[9] Federal courts also have jurisdiction to review allegations that agency officials have acted outside their statutory authority. *See Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 335, 53 S.Ct. 167, 170, 77 L.Ed. 341 (1932); *Jean v. Nelson*, 727 F.2d at 966, 967 n. 11. *See also Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985) (court of appeals has jurisdiction to review allegations that agency has abused its discretion by failing to comply with own regulations).

[10] Appellants also suggest that the organizational plaintiffs do not have standing "to assert the legal rights and interests of third parties." The district court's conclusion that HRC and MRS had standing, however, was not based on a theory of third-party standing. Instead, the court concluded that HRC and MRS had standing to challenge INS practices in their own right under the theory of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), which held that an organization which promotes racially integrated housing had sustained sufficient injury to establish standing to challenge the discriminatory practices of a real estate agency. *Id.* at 379, 102 S.Ct. at 1124. *See also Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38

Meese, 687 F.Supp. 650, 660 (D.D.C.1988). As to the individual plaintiffs,[11] appellants argue that exhaustion is required by section 1105a(c), which provides that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right. . . ." 8 U.S.C. §1105a(c). We rejected this argument as well in *Haitian Refugee Center v. Smith*, which involved a constitutional challenge to procedures adopted by the INS for the processing of asylum claims. Like plaintiffs in that case, the individual plaintiffs here do not seek substantive review of any individual ruling respecting their status. Rather, they challenge the adequacy of the procedures employed in the processing of their SAW applications.[12] Accordingly, the exhaustion requirement imposed by section 1105a has no bearing on the district court's jurisdiction in this action.

Having concluded that the statutory exhaustion requirement is inapplicable, we now turn to the judicially-created exhaustion doctrine. We note at

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(D.C.Cir. 1986) (counseling organization alleging inhibitions of its daily operations had standing to challenge Health and Human Services secretary's implementation of the Age Discrimination Act).

[11] The members of the plaintiff class are at varying stages of the application process.

[12] Appellants' reliance on *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022, 106 S.Ct. 1213, 89 L.Ed.2d 325 (1986), is misplaced. In that case, which also involved a class-wide challenge to INS procedures, we held that the statutory exhaustion requirement barred plaintiffs' additional claims for *substantive* review of their deportation and exclusion orders. In this case, no substantive relief is requested.

the outset that the application of the judicial exhaustion doctrine is subject to the discretion of the trial court. *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1556-57 (11th Cir.1985). The general rule is that a challenge to agency action in the courts must occur after available administrative remedies have been pursued. *Id.* at 1556. Exhaustion is not required, however, where the administrative remedy will not provide relief commensurate with the claim. *Id.* The nature of plaintiffs' constitutional challenge of INS procedures is such that relief at the administrative review level would have been unlikely. The chances are remote that the INS would have considered substantial revision of the procedures devised for the processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application. *See Mathews v. Eldridge*, 424 U.S. 319, 330, 96 S.Ct. 893, 900, 47 L.Ed.2d 18 (1976); *Haitian Refugee Center v. Smith*, 676 F.2d at 1034. We therefore conclude that the exhaustion doctrine did not bar the district court's assertion of jurisdiction, and that the court acted well within its discretion in entertaining plaintiffs' claims for relief.

IV Preliminary Injunction

The grant or denial of a motion for preliminary injunction is a decision within the discretion of the trial court. *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir.1983). Appellate review of the district court's decision is very narrow. Accordingly, a district court's decision will be reversed only where there is a clear abuse of discretion. *Revette v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 740 F.2d 892, 893 (11th Cir.1984).

That discretion is guided by four requirements for preliminary injunctive relief: (1) a substantial likelihood that the movants will ultimately prevail on the merits; (2) that they will suffer irreparable injury if the injunction is not issued; (3) that the threatened injury to the movants outweighs the potential harm to the opposing part; and (4) that the injunction, if issued, would not be adverse to the public interest. *United States v. Alabama*, 791 F.2d 1450, 1459 n. 10 (11th Cir.1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

In enacting the Special Agricultural Worker program, Congress and the executive branch have granted aliens a constitutionally protected right to apply for temporary residency as well as a right to substantiate their claims for eligibility. *See, e.g., Haitian Refugee Center v. Smith*, 676 F.2d at 1038 (Congress intended through establishment of asylum procedure to grant aliens right to submit claims for asylum and opportunity to substantiate such claims). Congress may, through the enactment of legislation, create a substantive entitlement to a particular governmental benefit. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970) (federally created property interest exists in continued receipt of welfare benefits). Once Congress chooses to create such a system of entitlements and promulgates rules which restrict the discretion of administrative officers to grant benefits under the system, a property interest is created that is accorded procedural due process protection. *See Board of Regents v. Roth*, 408 U.S. 564, 576-577, 92 S.Ct. 2701, 2708-2709, 33 L.Ed.2d 548 (1972).

Having concluded that an entitlement interest exists in the right to apply for SAW status, it remains for us to determine what safeguards due process requires. In evaluating the constitutional sufficiency of the procedures provided, we must consider (1) the interest at stake for the individual, (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value of additional procedural safeguards, and (3) the government's interest in avoiding the potential burdens that the additional or substitute procedures would entail. *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903; *see also Landon v. Plasencia*, 459 U.S. 21, 34, 103 S.Ct. 321, 330, 74 L.Ed.2d 21 (1982) (*Mathews* test appropriate for evaluation of procedures in immigration context).

Plaintiffs' interest in establishing their entitlement to adjustment under the SAW program is plain. Evidence as to the second *Mathews* factor is equally persuasive. Without an adequate interpreter at the interview, the risk of an erroneous recommendation is unacceptably high. The ability of the adjudicator at the interview to make a reasonable assessment of the applicant's credibility is obviously hampered by his inability to understand the applicant's statements. Furthermore, the preclusion of witness testimony clearly increases the risk of erroneous determinations in light of the practice of cursorily denying applications accompanied only by affidavits, especially in cases involving inadequate documentation of employment history.

Paragraphs (6)[13] and (7) of the district court's order require no more than is required by IRCA, its

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[13] Paragraph (6) requires LOs to "maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages . . . if necessary." This provision is properly tailored to meet the requirements of due

accompanying regulations and INS procedures. Appellants concede that the SAW program requires that an interpreter be used in every case where the applicant does not understand the adjudicator. The INS Examinations Handbook directs the examining officer to "make certain whether the services of an interpreter are required" if the person being questioned does not speak English. The regulations clearly allow the presentation of witness testimony, *see* 8 C.F.R. § 210.3(b)(3), (c). Appellants acknowledge that the general rule is that SAW applicants may bring witnesses to testify on their behalf. Because appellants' procedures already contemplate what these provisions of the injunction require, it is unnecessary for us to consider the third *Mathews* factor.

Paragraph (8) of the injunction directs LO interviewers to "particularize the evidence offered, testimony taken, credibility determinations and any of the relevant information on the form I-696." Appellants argue that this requirement constitutes an additional procedure which would entail significant administrative and financial burdens. Without any record of what transpired at the interview, however, the review provided for in IRCA is meaningless. "Meaningful review requires that the reviewing court should *review*." *Kent v. United States*, 383 U.S. 541, 561, 86 S.Ct. 1045, 1057, 16 L.Ed.2d 84 (1966) (emphasis added). Due process thus requires that the interviewer set forth the factual basis for his recommendation with sufficient specificity to permit the RPF (and eventually the Administrative Appeals

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process. "If necessary," however, does not mean that interpreters in other languages shall automatically be required, absent court order, in the case of an non-English speaking applicant who speaks neither Spanish nor Haitian Creole.

Unit and court of appeals) to make a decision regarding the recommendation. *See, e.g., Jang Man Cho v. Immigration & Naturalization Service*, 669 F.2d 936, 940 n. 6 (4th Cir.1982) (reasons for finding witness unbelievable should be fully stated as a prerequisite for appellate review).

For the reasons set forth above, we conclude that the district court did not abuse its discretion in granting plaintiffs' motion for preliminary injunction. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-1066-Civ-ATKINS

HAITIAN REFUGEE CENTER, INC., a not-for-profit corporation; ROMAN CATHOLIC DIOCESE OF PALM BEACH; MARIE GIZELE ANGRAND; GERMAINE CADET; ROSITA DELVA; DIEUMERCIE DESIR; JOSEPH SAINTIL DIEUDONNE; GERALD HENRY; MARIE FRANCE JEAN-PHILIPPE; NOVAMISE JULIEN; FRANCKLIN JOSEPH; SYLVIA LINDOR; RECOL NEUS; ROSE PIERRECINA LEBON PIERRE; MARIE PHILOMENE SERVILIEN; HECTOR TREJO TAMAYO; JUAN TAMAYO VEGA; MARIE RAQUEL VIERA; and JEANETTE VIXAMA, PLAINTIFFS

vs.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service; PERRY RIVKIND, District Director, Immigration and Naturalization Service, District Office Number 6; KENNETH PASQUARELL, District Director, Immigration and Naturalization Service, District Office Number 26; WILLIAM CHAMBERS, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region; IMMIGRATION AND NATURALIZATION SERVICE, Department of Justice; RICHARD NORTON, Associate Commissioner for Examination, Immigration and Naturalization Service; WILLIAM SLATTERY, Assistant Commissioner for Legalization, Immigration and Naturalization Service; EDWIN MEESE, III, Attorney General of the United States; and UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANTS

[Filed Aug. 22, 1988]

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION AND CERTIFYING THE CLASS

THIS CAUSE is before the court on the plaintiffs' motion for a preliminary injunction. After an extensive hearing at which the parties offered evidence and presented witnesses and after exhaustive briefing, the court concludes that it is vested with jurisdiction to consider this matter and renders this Memorandum Decision in accordance with Fed. R. Civ. P. 52(a). It is further

ORDERED AND ADJUDGED that the plaintiffs' motion is *GRANTED.*

This action was initiated on behalf of the Haitian Refugee Center ("HRC"), the Migration and Refugee Services of the Diocese of Palm Beach ("MRS"), and 17 individual applicants for temporary residence under the Special Agricultural Workers ("SAW") provisions found at section 210 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1160, as amended by the Immigration Reform Control Act ("IRCA"), Pub. L. 99-603, 100 Stat. 3417.[1] The plaintiffs seek declaratory, mandatory, and injunctive relief for themselves and a class of persons who have applied or will apply for SAW status and who have been or will be denied such status because of the defendants' alleged unlawful practices and policies. The plaintiffs contend that the defendant Immigra-

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[1] IRCA created section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160.

tion and Naturalization Service ("INS") officials have (1) imposed an unlawful burden of proof by requiring applicants to produce corroborating evidence in addition to affidavits to prove the performance of the requisite ninety man-days of agricultural labor, (2) denied the individual plaintiffs' alleged "non-frivolous" applications prior to March 29, 1988, and thus denied work authorization pending final adjudication of the claims contrary to the statute and regulations, (3) issued I-292 notices of denial which failed to state the specific reasons for denial and provided incorrect information for purposes of appeal, and (4) imposed an interview procedure which violates the applicants' Fifth Amendment right to due process by failing to provide interpreters, failing to allow the applicants to rebut adverse evidence, and refusing to allow the applicants to present witnesses on their own behalf.

The plaintiffs seek a preliminary injunction: (1) enjoining the defendants from applying an improper burden of proof to SAW applications; (2) enjoining defendants from utilizing an interview process that is procedurally deficient by failing to allow applicants to clarify information, failing to apprise applicants of adverse evidence with an opportunity to rebut, failing to provide an opportunity to present live witnesses, failing to provide competent interpreters, and failing to make a verbatim transcript; (3) requiring the defendants to readjudicate all SAW applications filed by the plaintiffs using the proper burden of proof; (4) requiring the defendants to readjudicate all SAW applications filed by the plaintiffs and members of the class they seek to represent which were denied at the Legalization Offices prior to March 29, 1988, for lack of work records, precise documentation, or for suspected fraud; (5) requiring the defendants to grant work authorization and stays of deportation to all the plaintiffs and members of the class they seek to represent whose applications were denied at Legalization Offices prior to March 29, 1988, for lack of work records, precise proof of employment, or suspected fraud; and (6) requiring defendants to renotify and provide specific reasons for denial to those applicants who received denials on form I-292.

BACKGROUND

The Special Agricultural Workers Program ("SAW") was created by and as part of the Immigration Reform and Control Act of 1986 ("IRCA") and was intended to extend lawful immigrant status to qualifying aliens. The program mandates that the Attorney General adjust the status of any alien to that of an alien admitted for temporary residence if that alien applies for a change in status between June 1, 1987, and November 30, 1988, and is able to establish that s/he has resided in the United States and performed seasonal agricultural services for at least ninety man-days during the twelve month period ending on May 1, 1986. *See* 8 U.S.C. §§ 1160(a)(1)(A) and (B). The applicant must also establish that s/he is admissible to the United States as an immigrant. 8 U.S.C. § 1160(a)(1)(C). An alien who is granted temporary residency under this program will eventually be admitted as a permanent resident. 8 U.S.C. § 1160(a)(2).

The application process begins at one of five Legalization Offices ("LO") located in the state of Florida where the application is reviewed and the

applicant interviewed.[2] The interviewing officer either denies the application, recommends that it be denied, or recommends that it be granted. Those applications not denied outright at the LO are forwarded to one of four Regional Processing Facilities ("RPF") for adjudication. A denial that issues either from an LO or from the RPF may be appealed to the Legalization Appeals Unit ("LAU"), the final administrative decision in a SAW applicant's case.[3]

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[2] Regulations to implement the SAW provisions were first promulgated on May 1, 1987. 52 Fed. Reg. 16190 *et seq.* and 16195 *et seq.* (May 1, 1987), codified at 8 C.F.R. Parts 103 and 210 (1987). In relevant part, the regulations provide that the application for SAW status must be filed on Form I-700 together with the necessary fee, report of medical examination, evidence of identity, and fingerprint chart. "Each applicant shall be interviewed by an immigration officer" at the appropriate INS Legalization Office, except that the interview may be waived when it is impractical because of the health of the applicant. 8 C.F.R. § 210.2(c) (2) (iv).

[3] Whenever a SAW application is denied by the LO or by the RPF, the applicant must be given written notice setting forth the specific reasons for the denial on Form I-692. 8 C.F.R. § 103.3(a) (2). The form must contain advice that the applicant may appeal the decision and that such appeal must be taken on Form I-694 within 30 days of service of the denial notification. *Id.* The appeal with the required fee must be filed with the RPF for consideration by the Associate Commissioner for Examinations (Administrative Appeals Unit ("AAU")). *Id.*; 8 C.F.R. § 210.2(f). If the AAU dismisses the appeal, no further administrative appeal is available nor may the application be filed or reopened before an immigration judge or Board of Immigration Appeals during exclusion or deportation proceedings. 8 U.S.C. § 1160(e) (2); 8 C.F.R. § 103.3(a) (2). The Act does provide, however, for judicial review of an administrative denial of a legalization application by the AAU, but only in the judicial review of an order of exclusion or deportation. 8 U.S.C. § 1160(e) (3).

LOs are "local offices of the Immigration and Naturalization Service which accept and process applications for legalization or special agricultural worker status", under the authority of the district directors in whose districts such offices are located." 8 C.F.R. § 210.1(h). At this stage, the interviewing officer determines whether a completed application filed for processing is "non-frivolous."[4] Under subsection (d) of section 210 of the Act, applicants who file a "non-frivolous" case of eligibility for SAW status under subsection (a) shall not be deported or excluded and shall be granted authorization to engage in employment pending final determination of his or her ap-

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[4] *See* H.R. CONF. REP. No. 99-1000, 99th Cong., 2d Sess. 85, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5852.

> The Conferees intend that the Immigration and Naturalization Service allow aliens to make a declaration, under penalty of perjury and under such terms and conditions that the Attorney General may by regulation provide, (i) attesting that they have in fact worked the requisite number of man-days required; (ii) identifying the type or nature of documentation they intend to adduce to make the necessary showing, (although this last shall not limit their rights to produce other evidence at a later date), (iii) acknowledging that false statements concerning their eligibility constitute a violation of Title 18 U.S.C., and may make them ineligible for this program and, further, subject to deportation or exclusion, and (iv) identifying their current or immediate past employer(s). *The Conferees intend that INS not go beyond these criteria in seeking to determine whether an alien has made a non-frivolous case for eligibility. To do otherwise may undermine the purposes of this section, viz., to encourage undocumented workers to come forward and seek to obtain legal status.*
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> Id. (emphasis added).

plication.[5] Only an LO is authorized to issue work authorization to an applicant who files a "non-frivolous" claim. 8 C.F.R. § 210.4(b).

The regulations initially provided that the district director could only deny, through the LOs, those applications found to be frivolous—those that clearly failed to meet the statutory requirements—or those applications in which the applicant admitted fraud or misrepresentation in its preparation. 8 C.F.R. § 103.1(n)(2). District directors may now deny all ineligible applications at the LO level, 53 Fed. Reg. 10062, 10064 (March 29, 1988), but the regulations contemplate that only those applicants filing frivolous or fraudulent claims be denied a stay of deportation or exclusion and work authorization. 8 U.S.C. § 1160 (d)(2) and (3)(B).

The applicant has the initial burden of proving by "a preponderance of the evidence" that s/he worked the requisite ninety man-days of seasonal agricultural services and may meet this burden by producing "sufficient evidence to show the extent of that employment as a matter of *just and reasonable inference.*" 8 U.S.C. § 1160(b)(3)(B)(i) (emphasis added). Having done so, "the burden then shifts to the Attorney General to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be drawn from the evidence." 8 U.S.C. § 1160(b)(3)(B)(iii).

[5] 8 U.S.C. § 1160(d)(2). The standard for defining "non-frivolous" was endorsed by Congress through an amendment to section 210(d) of the Act, 8 U.S.C. § 1160(d) on December 22, 1987. Pub. L. 100-202, 101 Stat. 1329-18 (Dec. 22, 1987). The new 8 U.S.C. § 1160(d)(3)(B) provides that "[d]uring the application period as defined in section 1160(a)(B)(1)(B) of this title any alient [sic] who has filed an application for adjustment of status within the United States as provided in section 1160(b)(1)(A) of this title pursuant to the provision of 8 C.F.R. section 210.1(j) is subject to paragraph (2) of this subsection."

The regulations provide that "[t]he sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility," and, to meet the burden of proof, an applicant must provide evidence of eligibility "apart from his or her own testimony." 8 C.F.R. § 210.3(b)(2). "Affidavits and other personal testimony by an applicant which are not corroborated, in whole or in part, by other credible evidence (including testimony of persons other than the applicant) will not serve to meet the applicant's burden of proof." 8 C.F.R. § 210.3(b)(3)).[6] If an employer or labor contractor has kept proper and adequate records, an applicant may meet the burden of proof by timely production of those records under regulations to be promulgated by the Attorney General. 8 U.S.C. § 1160(b)(3)(B)(ii): *but see* n.10 *infra*. An alien may also meet the burden of proof by producing affidavits of agricultural producers, farm labor contractors, union officials, fellow employees, or other persons who have knowledge of the applicant's employment. 8 C.F.R. § 210.3(c)(3). The affiant must provide "a certified copy of corroborating records *or* state [his] willingness to personally verify the information provided." *Id.* (emphasis added).

[6] The INS considers that an affidavit by the applicant is no different than his testimony and a recent amendment to the regulation omits an earlier reference to the applicant's affidavit to avoid confusion. 53 Fed. Reg. 10063 (March 29, 1988).

FACTS

The individual plaintiffs are applicants who have been denied SAW status. The plaintiffs Jean-Phillipe, Vixama, Delva, and Henry were denied at the LO; the plaintiffs Angrand,[7] Lindor, Neus, Joseph, Tamayo, Vega, and Viera were denied by the RPF. Julien and Servilien were denied by the RPF and their denials affirmed on appeal by the LAU.[8]

The plaintiff HRC is a non-profit membership corporation organized under the laws of the state of Florida with its principal place of business in Miami. Its membership consists of Haitian refugees and its main function is to provide its membership with legal representation.

The Roman Catholic Diocese of Palm Beach through its component the plaintiff MRS is an affiliate of the

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[7] Plaintiffs Angrand and Dieudonne were both recommended for approval by the examiner who interviewed the applicant. Both cases were denied directly by William Chambers, director of the Texas RPF. There is no indication in these files that the INS had any reason to doubt the credibility of the affiant or that any material inconsistencies were found between the information provided in the application and in the interview. Gesner Desmornes, the farm labor contractor for whom both Plaintiffs Angrand and Dieudonne worked, testified as to his lack of payroll records and the fact that INS never contacted him to verify Plaintiffs' employment. Mr. Desmornes is not on the list of "suspect contractors" which Defendants used to identify questionable affidavits.

[8] In fact, Plaintiff Julien responded to the RPF's decision that she was ineligible, because she has failed to submit additional corroborating evidence of her claim other than affidavits from her crew leader, by submitting additional evidence, including affidavits from the owner of the farm where she worked, her crew leader and a co-worker. She was denied by the LAU because she had not submitted payroll records.

United States Catholic Conference. MRS has been designated by the INS as a Qualified Designated Entity ("QDE") under section 245A(C)(2) of the IRCA, 8 U.S.C. § 1255A(c)(2) for the purpose of receiving the applications of farmworkers seeking SAW status. MRS serves the Diocese of Palm Beach including the geographical areas of Palm Beach, Martin, St. Lucie, Indian River, and Okeechobee Counties. The Diocesan program provides counseling to SAW applicants and receives applications for refugee status.

As of July 6, 1988, the INS District LOs servicing the state of Florida had received 77,861 SAW applications; 73,246 of those applicants had received interviews as of that date. Of those interviewed, 54,536 were recommended for approval and 14,524 for denial by the LO. The remaining 4,086 were denied at the LO.[9]

Of the 77,609 applicants as of July 1, 1988, 30,425 are Haitians who speak Creole. Although most SAW applicants do not speak English, the INS does not provide interpreters at SAW interviews. Non-English speaking applicants are expected to provide their own interpreters; the INS does not investigate the proficiency of any interpreter beyond asking if they understand English and the language which they intend to interpet. The record of the interview does not identify the interpreter, his or her qualifications, or in fact whether an interpreter was used. The

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[9] Mr. William Chambers director of the RPF in Texas which adjudicates applications filed in the state of Florida testified that the denial rate in SAW cases is approximately 29%. The denial rate for applications filed for legalization under section 245A of IRCA is less than 5%.

Okeechobee LO has never had a Creole speaking employee.

The interview is an extremely important step in the application process. It is the only face to face encounter between the applicant and the INS allowing the INS to assess the applicant'z credibility. Yet, the INS does not record or prepare a transcript of the interview. Any inconsistencies between the applicant's documents and information elicited by the interviewer are to be noted on the worksheet, Form I-696, however, the plaintiffs' worksheets contain very little information pertaining to the interview or credibility determinations.

An applicant may only inspect this worksheet through a request pursuant to the Freedom of Information Act.

Applicants whose applications are determined to be non-frivolous but are recomended for denial at the LO level are usually not made aware of the recommendation or its basis.

Farm labor contractors and other agricultural employers often do not maintain accurate employment records. This makes it difficult and, in many cases, impossible for a farm worker to produce formal documentation.[10] Farm workers are likely to be paid in

[10] Laws such as the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1801 *et seq.* and its predecessor, the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 *et seq.* require farm labor contractors and other agricultural employers to maintain proper payroll records and provide pay receipts. Numerous cases brought either in this state or against Florida-based farm labor contractors demonstrate that violations of these recordkeeping provisions remain widespread, if not pervasive. *See, e.g., Washington v. Miller,* 721 F.2d 797 (11th Cir. 1983); *Rivera v. Adams Packing Ass'n, Inc.,* 707 F.2d 1278 (11th Cir. 1983); *Lucien*

cash by farm labor contractors whose lists of workers are often incomplete.[11] Testimony suggested that in cases where records were kept, employers are frequently reluctant to produce them for fear of incriminating themselves for violations of federal law and subjecting themselves to civil penalties.

Bertrand, et al. v. Jimmie Lee Jorden, 672 F. Supp. 1417 (M.D. Fla. 1987); *Bohan v. Hudson,* 28 Wage & Hour Cas. 357 (BNA) (E.D.N.C. 1987); *Haywood v. Barnes,* 109 F.R.D. 58 (E.D.N.C. 1986); *Davis v. Williams,* 622 F. Supp. 386 (W.D.N.Y. 1985); *Donovan v. Anderson,* 24 Wage & Hour Cas. 1468 (BNA) (D.S.C. 1981).

[11] Many times payroll records maintained by farm labor contractors do not list all of the individuals who worked for that employer; often, farm labor contractors and agricultural employers whose records are deficient are reluctant to make those records available to their employees or former employees because they fear they will be subject to civil penalties for violations of federal laws enacted for the protection of the farmworkers and for back social security and unemployment insurance taxes. A most common situation is when a husband and wife or, in some cases, an entire family, work together under a single name. Often, where workers are being paid on a piece-rate basis, several workers may work together filling a bucket or a bin (as in the case of citrus) for which they receive a ticket. The work may be recorded only under the name of the worker who turns in the tickets at the end of the day. In some cases, the work done by four or five workers may be listed under a single name. Often, the work of alien workers who lack valid social security numbers is recorded under the name of a former U.S. worker with a valid number. Unlike the situation in which a worker is using an alias or a false social security number, workers in this situation may be unaware that their work is being improperly recorded. Sometimes certain workers are not listed at all on payroll records furnished by the contractor to the farm operator. In some cases records which once existed were lost or stolen. In some cases, records are simply not kept.

Congress specifically recognized this problem and provided a solution when it created the SAW program. If an employer or farm labor contractor kept proper and adequate records, the applicant's burden of proof "may be met by securing timely production of work records under regulations promulgated by the Attorney General." 8 U.S.C. § 1160(b)(3)(B)(ii).[12] When records are nonexistent or unavailable, the applicant can meet the burden of proof "by producing sufficient evidence to show the extent of that employment as a matter of just and reasonable inference. In such a case, the burden then shifts to the Attorney General to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be drawn from the evidence." 8 U.S.C. § 1160(b)(3)(B)(iii).[13] Congress intended

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[12] Although only three and one-half months remain in the application period, the Attorney General has not promulgated any regulations which provide for the timely production of this proof. On May 31, 1988, the District Court for the Eastern District of California issued a preliminary injunction ordering Defendant Nelson to forthwith promulgate regulations which shall provide for the timely production of employment records in accordance with IRCA. *United Farmworkers of America (AFL-CIO et al., v. INS et al.*, Civil Action No. 87-1064-LKK (E.D. Cal. May 31, 1988). As of July 21, 1988, Defendants had not promulgated any regulations.

[13] Congress intended that for purposes of interpretation of the requirements of section 210, 8 U.S.C. § 1160(b)(3)(B) the standards embodied in Fair Labor Standards case law govern. The House Report noted:

> in a line of cases leading from *Anderson v. Mt. Clemens Pottery Co.*, 66 S.Ct. 1187 (1946), (including cases which specifically address the unique documentation of work history problems in the agriculture, such as *Beliz v. W.H. McLeod Co.*, 765 F.2d 1317 (1985)), courts have dealt

to encourage aliens to utilize the SAW program and to aid growers of perishable commodities often dependent upon a crew of illegal laborers to harvest crops. H.R. Conf. Rep. No. 99-1000, 99th Cong., 2d Sess. 85, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5840, 5850-51.

Wayne Joy and John Adamczyk both testified that the Defendants were directed to take a liberal view in determining whether the just and reasonable inference had been created, yet Defendants have not received any training or instructions as to the shifting burden of proof to be employed in SAW cases. Wayne Joy stated that the burden required to meet the just and reasonable inference is identical to the burden required to meet the nonfrivolous standard.

On May 1, 1987, the INS issued regulations allowing applicants to establish qualifying employment by submitting affidavits of growers, foremen, farm labor

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> with fact patterns involving employee loss of records, destruction or falsification of records by employers, and other difficult circumstances where precise evidence of hours worked is lacking.
>
> *This problem is compounded in agriculture*, where pay records may only show piece rate units completed. While this Act will require evidence of hours worked, the lack of hourly records for agricultural employees (which could result from small employer exemptions from wage and hour laws as well as from employment by farm labor contractors or others whose recordkeeping practices are deficient), has led the Conferees to conclude that fairness dictates they create a presumption in favor of worker evidence, unless dispoved [sic] by specific evidence adduced by the Attorney General.

H.R. Conf. Rep. No. 99-1000, 99th Cong., 2d Sess 85, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5840, 5853 (emphasis added).

contractors, and fellow employees.[14] The regulations require the affiant to provide a certified copy of corroborating records or state his or her willingness to verify personally the information contained therein.[15]

Prior to the application period, representatives of several Qualified Designated Entities ("QDEs") met with the Deputy Commissioner of the INS in charge of the SAW program and developed an affidavit for use by applicants to satisfy the requirements of the regulation. The I-705 "Affidavit Confirming Seasonal Agricultural Employment of an Applicant for Temporary Residence Status Under Section 210 of the Immigration and Nationality Act," is designed to provide information of when, where, and in what crops the applicant labored. The form, which recites that the affiant is "willing to personally confirm this information, if requested" and is to be signed under penalty of perjury, was published in the Federal Register at 52 Fed. Reg. 16195 (May 1, 1987).

During the first several months of the program, affidavits sufficed to corroborate the applicant's claim of employment. Suspicion of widespread fraud in the application procedure led the LOs to demand cor-

[14] 8 C.F.R. § 210.3(c)(3). "The weight and probative value of any affidavit accepted will be determined on the basis of the substance of the affidavit and any documents which may be affixed thereto which may corroborate the information provided." *Id.*

[15] Defendants testified, however, that in the majority of cases they do not contact the affiant/crew leader to verify the information contained in the I-705 and supporting crew leader affidavits. Similarly, Wayne Joy testified that crew leader affidavits are generally not considered as credible evidence if the farm owner has no independent record regarding the SAW applicant.

roborative evidence, such as payroll records, pay stubs, and rent receipts, and to deny many applications accompanied only by the form I-705 affidavit.

According to defendants' testimony, an affidavit would not be sufficient if the weight of the affidavit comes into question because of its connection to fraud, inconsistencies, or other credibility questions. The defendants' standard for judging credibility questions may hinge upon the fact that applicants often cannot identify the grower, the name of the farm, or the area in which it is located.[16] Farm workers may only know the name of their crew leader or labor contractor who collects them from a preappointed spot in the morning and redelivers them in the evening. Therefore "inconsistencies" between the interview and the written application may develop because an applicant improperly identifies a "growing area" or cannot name an employer. The interview is the sole means of judging an applicant's credibility.

The Miami District developed a list of farm labor contractors and immigration consultants suspected by the INS of being involved in fraudulent applications. The list was given to each interviewer for use in evaluating individual applications. Contractors or others whose names appeared on the "list" were often not aware of the fact nor were they provided with an opportunity to rebut the "suspected" fraud.

Although applicants should be made aware of adverse evidence considered during the evaluation of their applications, 8 C.F.R. § 103.2(b)(2), appli-

[16] Applicants have been denied at the local office because of an inconsistency between the dates the applicants claimed to have worked and a chart or map showing harvest dates to which the examiner referred.

cants were not told if an affiant who supported the alien's applications appeared on the list nor were they given an opportunity to supplement their applications to support a suspect affidavit.[17] Applicants were not told if or why their applications were recommended for denial.[18]

Plaintiffs Henry and Jean-Phillipe, denied after their initial interview because their affiant appeared on the list of "suspected" labor contractors, were not given the opportunity to rebut the adverse evidence. In some cases, all applications accompanied by an affidavit bearing the name of a contractor or other individual whose name appeared on the "list" were denied for failure to produce corroborative evidence, despite the fact that some of those who appeared on a list were genuine crewleaders whose names had been used by another. In such a case, though the applicant had actually worked for the suspected crewleader, his

[17] The regulations contemplate the possibility of a second interview required by the RPF "if the alien in the second interview can establish eligibility for approval." 8 C.F.R. § 103.1(n)(2). No evidence suggested that any applicant was given a second interview.

[18] In addition to the lists of suspect individuals utilized at the LO level, Defendant Chambers testified that at the RPF, examiners received reports from the Document Analysis Unit ("DAU") as well as other agencies concerning SAW applicants and affiants suspected of fraud. The DAU regularly prepares reports or bulletins which go to each of the examiners as well as to all LO's in the Region. (Testimony of William Chambers). In general, cases in which fraud was suspected were not denied on the basis of fraud or misrepresentation but on the grounds that the applicant had failed to meet his or her burden of proof. Thus, applicants were not specifically informed that the basis of the denial was evidence concerning a contractor, the nature of that evidence, or of any other evidence which adversely affected their cases.

or her application was denied merely because the crewleader's name was under suspicion. William Chambers testified that form notices of denial were issued to hundreds possibly thousands of applicants. The denial stated that the "affidavits were signed by the same affiant and were not substantiated by any additional credible evidence such as piecework receipts or employers' daily records." [19]

A wire addressed to all district directors, regional legalization officers, and the Legalization Appeals Unit, dated April 11, 1988, instructed the parties that 8 C.F.R. § 103.2(b) requires that applicants be advised of adverse evidence considered by the INS and that they be given an opportunity to present evidence to rebut it prior to a decision. The directive provided that an I-72 notice be sent to any applicant whose application was to be denied because of adverse evidence and that the applicant be given thirty days to overcome its inference. But no measures were

[19] Plaintiffs Angrand, Cadet, Dieudonne, Neus, Pierre, Tamayo and Vega each received an identical form denial which contained the same two paragraphs:

> In support of your application, you have submitted a Form I-705, Affidavit Confirming Seasonal Agricultural Employment, and a written affidavit to establish your eligibility. However, these affidavits were signed by the same affiant, and *were not substantiated by any additional credible evidence such as piecework receipts or employers' daily records.*
>
> In the *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966), it was held that the burden of proof is upon the alien to establish his or her eligibility for a benefit. Pursuant to Title 8, Code of Federal Regulations, Part 210.3(b)(1), the burden of establishing eligibility for the benefit you seek falls upon you. You have failed to meet this burden.

(emphasis added).

taken to correct denials effected without informing the applicant of adverse evidence that occurred prior to issuance of the directive.[20]

JURISDICTION

The defendants challenge the jurisdiction of the court without which the remainder of this decision would be fruitless. Therefore this court, having considered the question as a threshold issue, finds jurisdiction vested for adjudication of this matter.

The defendants note that both administrative and judicial review of INS decisions on SAW applications are provided for by IRCA. Title 8 U.S.C. § 1160, the IRCA provision addressing legalization for SAW applications, expressly states that sole judicial review of a denial of SAW status occurs during the applicant's deportation case. It provides:

> There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.
>
> * * * *

[20] The wire did specify that any denial based upon adverse evidence not supplied to the applicant and prior to issuance of an I-72 notice would be subject to reopening upon a motion by the applicant. The regulations, however, provide no mechanism to reopen and in fact state: "Motions to reopen a proceeding or reconsider a decision under Part 210 or 245a of this chapter *shall not be considered.*" 8 C.F.R. § 103.5 (emphasis added). Although section 103.5 allows the Associate Commissioner Examinations or the Chief of the Administrative Appeals Unit to *sua sponte* reopen any proceeding under Part 210, no effort to reconsider any decision rendered prior to April 11, 1988, has been made.

> There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.

8 U.S.C. § 1160(e)(3)(A).

The defendants urge that Congress deliberately structured the system in a way to exclude participation by district courts. Under IRCA, aliens cannot contest the denial of their SAW applications unless and until the INS institutes deportation proceedings against them.[21] District courts lack jurisdiction to adjudicate deportation proceedings which are initially tried by an immigration judge. 8 U.S.C. § 1252(b); 8 C.F.R. §§ 1.1(1) and 242.8. Appeal of an adverse decision by the immigration judge goes to the Board of Immigration Appeals. 8 U.S.C. § 1105a(c); 8 C.F.R. § 3.1(b). Only after exhausting these administrative remedies may an alien seek review and his appeal is then directed to the courts of appeals. 8 U.S.C. § 1105(a)(2). It cannot be disputed that "petition for review in the Court of Appeals 'shall be sole and exclusive procedure for the judicial review of all final orders of deportation . . . .'" *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 937 (1983) (quoting Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105a(a)). Therefore, had the plaintiffs chosen to challenge denial of the individual applications, this court would be without power to address the complaint. The plaintiffs' complaint, however, does not challenge any individual determina-

[21] Section 210(e), 8 U.S.C. § 1160(e)(2) provides for a single level of administrative appellate review of applications and restricts judicial review to the context of review of an order of exclusion or deportation.

tion of any application for SAW status but rather attacks the manner in which the entire program is being implemented, allegations beyond the scope of administrative review.

In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), the Fifth Circuit considered a class action suit brought by Haitians seeking political asylum in the United States. The complaint challenged the expedited administrative procedure employed by the INS in processing the asylum applications of members of the plaintiff class. The government argued the same grounds that it is arguing before this court, that is: (1) exclusive jurisdiction is conferred upon the courts of appeals under 8 U.S.C. § 1105a(a), and (2) though the court has jurisdiction, it should decline to exercise it because the plaintiffs failed to exhaust their administrative remedies. The court in *Smith* recognized congressional intention to give the courts of appeals exclusive jurisdiction over all final orders of deportation, but the court also highlighted the narrow exception that allows juristion to the district court "insofar as the [complaint] set[s] forth matters alleged to be part of a pattern and practice by immigration officials to violate the constitutional rights of a class of aliens" under its federal questions jurisdiction. 676 F.2d at 1033. The court stated that to the extent that the "irregularities may provide a basis for reversal of an individual deportation," the court of appeals still has exclusive jurisdiction to review the alleged procedural irregularities. *Id.* The court drew a distinction "between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent that it may affect the merits determination, on the one

hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." *Id.*

In *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), the Eleventh Circuit considered a class action on behalf of Haitian aliens detained in facilities pending final determination of their asylum cases. The plaintiffs alleged violations of the Administrative Procedure Act and discriminatory detention. The court stated that "executive officials 'function as agents of Congress in enforcing the law . . . . If such officers depart from the zone of authority charted in the statute they act illegally and their actions can be corrected in the courts.'" 727 F.2d at 966 (citations omitted).

In the case before this court, the plaintiffs allege that the defendants have exceeded their authority by illegal implementation of stated congressional intent. To deny jurisdiction would be to allow illegal agency action to go unchallenged. *Lloyd Sabaudo Societa Anomina Per Azioni v. Elting*, 287 U.S. 329 (1932); *Mahler v. Eby*, 264 U.S. 32 (1924); *Gegiow v. Uhl*, 239 U.S. 3 (1915). This court does not, by this decision, intend to widen the narrow holding in *Smith* but rather finds that the present case fits within that narrow exception.[22]

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[22] Apart from the federal question jurisdiction raised by the allegation of any constitutional violations is the question of whether an agency deviated from its own regulations and procedures, an issue justifying judicial relief in a case otherwise properly before the court. *See Haitian Refugee Center v. Smith*, 676 F.2d at 1041 n.48 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954)).

STANDING

The defendants assert that the organizational plaintiffs lack standing because they have not established a cognizable injury nor have they established the causation elements required to find a case or controversy. To establish standing, "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)), "and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976) (footnote omitted)). The exercise of judicial authority is thus limited to litigants who are able to demonstrate "injury in fact" resulting from the complained of behavior. *Valley Forge*, 454 U.S. at 473.

The Supreme Court has also recognized that, beyond constitutional requirements, there exist certain prudential principles that require the court to refrain from adjudicating " 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475 (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (footnote omitted)). Finally, the plaintiffs' complaint must fall within "the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge*,

454 U.S. at 475 (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (footnote omitted).

The organizational plaintiffs before this court have satisfied both constitutional and prudential requirements for standing and thus their claims are cognizable. The constitutional requirements encompass three components: (1) injury in fact, (2) causation, and (3) redressability. Numerous courts have found standing based upon allegations similar in scope to those presented by the plaintiffs HRC and MRS.

HRC has alleged that the "[d]efendants' refusal to recognize that such persons [HRC's members] are eligible under IRCA both directly and indirectly injures HRC. It directly injures the organization because it makes HRC's work of assisting the Haitian refugee community more difficult and results in the diversion of HRC's limited resources away from members and clients having other urgent needs." Complaint at ¶ 17. HRC also alleges an indirect injury through the adverse effect upon its members. *Id.* The plaintiff MRS is a QDE under IRCA authorized to provide counseling to aliens about the legalization process and to assist them in obtaining documentation. It also receives applications and fees from aliens and is reimbursed by the INS for counseling and filing services. MRS alleges that the defendants' behavior has discouraged otherwise eligible SAW applicants from seeking counseling and/or filing their claims and MRS is prevented from fulfilling its basic mission of assisting aliens to qualify under IRCA. *Id.* at ¶ 18.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court addressed the standing of an organization. Housing Opportunities Made

Equal ("HOME"), whose purpose was "'to make equal opportunity in housing a reality in the Richmond Metropolitan Area.'" *Id.* at 368 (quoting App. at 13, ¶ 8). The organizational plaintiff's activities included operation of a housing counseling service and the investigation and referral of complaints of housing discrimination. 455 U.S. at 368. The Court found that:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests . . . ."

Id. at 379. The plaintiff HOME's complaint alleged simply that it "has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id.* at 379.

In *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), the court, recognizing the standard set by the Supreme Court in *Havens*, found that the appellant, whose function was, through informational counseling, referral, and other services, to improve the lives of elderly citizens, had sufficient standing to press its claim. As in the case before this court, the appellant in *Action Alliance* alleged "in-

hibition of their daily operations, an injury both concrete and specific to the work in which they are engaged." 789 F.2d 938 (footnote omitted).

HRS and MRS, whose very existence is devoted to assisting Haitian refugees through legal counseling and referral, have concrete programmatic concerns that form an adequate basis for alleging an injury in fact and thus fulfill the primary constitutional requirement for standing.[23] But, though a plaintiff demonstrates a very real injury, it may lack standing because of the absence of causation or redressability. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 40-46. The causal connection in the present case cannot be deemed "speculative." *See id.* at 45. The defendants in the case before this court have actual control over the implementation of the SAW program and their alleged mishandling is the very basis for the plaintiffs' complaint. Finally, because the defendants control implementation of the regulations, requiring them to recognize and abide by these regulations would provide the plaintiffs with the remedy they seek and resolve the alleged injury.[24] Therefore the plaintiffs meet the Article III requirements for standing to pursue this action.

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[23] "That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977), and accordingly does not deprive the organization of standing." *Havens*, 455 U.S. at 379 n.20.

[24] The court in *Action Alliance* noted that "dismissal on the pleadings is inappropriate, even if 'the extreme generality of [a] complaint' leaves 'injury in fact' in doubt, when standing requirements may be satisfied upon affording plaintiffs 'an opportunity to make more definite the allegations of the complaint.'" 789 F.2d at 938 (quoting *Havens*, 455 U.S. at 377-78).

The dispute before this court also fulfills the prudential standing requirements outlined in *Valley Forge*. 454 U.S. at 475. The interests at stake are not " 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches," *Id.* (quoting *Warth v. Seldin*, 422 U.S. at 499-500), but rather are particularized concerns that affect an identificable group of people. Finally, HRC claims that defendants' behavior makes it increasingly difficult to render the legal assistance that forms the core of its functions. HRC's interest in aiding the applicants' legalization process falls squarely within the "zone of interests" that is protected by the statute. *See, e.g., Action Alliance*, 789 F.2d at 939 (interests as promotion of knowledge, enjoyment, and protection of rights created by a statute are in the zone of interests); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1010 (D.C. Cir. 1977) (environmental group's participation in passage of the statute); *Consumers Union v. Federal Trade Commission*, 691 F.2d 575, 576-77 (D.C. Cir. 1982) (en banc) (consumer groups may challenge FTC rules that withhold used car information from consumers)

CLASS CERTIFICATION

Fed. R. Civ. P. 23(a) lists four prerequisites to class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule

23(b)(2) allows a class action when the requirments of 23(a) have been met and "the party opposing the class action has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding relief with respect to the class a whole."

The defendants have not challenged the adequacy of the representative parties' protection of the class interests and so this court will address only those challenges to class certification that contend: (1) the numerosity allegations are too vague to be credited; (2) the plaintiffs have not demonstrated that they meet the commonality and typicality requirements; and (3) the plaintiffs never clearly described the class they seek to have certified. This court concludes that the defendants' arguments lack merit for the following reasons.

The defendants correctly state that the mere allegation that a class is too numerous to make joinder practicable is insufficient to satisfy this basic requirement. *See, e.g., Fleming v. Travenol*, 707 F.2d 829, 833 (5th Cir. 1983). A court must look to the specific facts of each case to determine the number of potential class members and whether joinder is possible. *See Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). Defendants err, however, by applying that rationale in this context. In their complaint, the plaintiffs define their action as one that "challenges the practices, policies and procedures of the INS for determining Lawful Temporary Resident status under the SAW program." The challenge is based on two grounds: (1) that the plaintiffs have been cast with an improper burden of proof in establishing their right to a change in residence status; and (2) that the INS has failed to promulgate regulations to

ensure that the applicants are able to secure needed records to establish their claims.

The plaintiffs Angrand, Cadet, Dieudonne, Neus, Pierre, Tamayo, and Vega each received an identical form denial, *see* n.14 *supra*, which merely stated that they had failed to submit sufficient credible evidence to substantiate their claims because their affidavits were not accompanied by "piecework receipts or employers' daily records." These form denials, which the plaintiffs allege were defective by imposing an improper burden of proof and by failing to state with particularity the reasons for denial were, according to defendants' witness William Chambers, issued to hundreds possibly thousands of applicants. Therefore the persons who have been affected by what the plaintiffs allege is illegal implementation of congressional policy number in the hundreds, possibly thousands, and therefore the numerosity allegations have been sufficiently established. The very number of the persons affected as well as the nature of their work and their economic means makes joinder impracticable.[25] *See, e.g., Jean v. Nelson*, 727 F.2d 957, 961 n.2 (11th Cir. 1984) (class certified by the district court was comprised of "[a]ll Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry

[25] The question of what constitutes impracticability depends on the particular circumstances in each case. *See* 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 1782. In *Armstead v. Pingree*, 629 F. Supp. 273 (D.C. Fla. 1986), the court found joinder impracticable particularly in light of the class members' economic resources, handicap, and confinement. In the instant case, the putative class members are migrant workers whose economic means militate against individual suits. In addition, the nature of the work requires that its laborers follow the agricultural seasons.

into the United States and also are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either: (1) Unrepresented by counsel; or (2) Represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Task Force of the Dade County Bar Association") (quoting *Louis v. Nelson* [*Louis III*], 544 F. Supp. 973, 984 (S.D. Fla. 1982); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1026 n.1 (11th Cir. 1982) (class certified by the district court included "all Haitian nationals who have applied for political asylum on or before May 9, 1979 under 8 C.F.R. § 108, and whose applications were or may be denied by the INS District Director or his designee in INS District Office No. 6, Miami, Florida").

The defendants challenge the plaintiffs' contention that there exist common questions of law or fact and that the representative parties exhibit claims that are typical of the class as a whole. Fed. R. Civ. P. 23(a)(2). It must be noted that this provision does not require that all of the questions of law and/or fact raised by the case be common to all the plaintiffs. *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 532 (5th Cir. 1978); 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 1763 (1986) (hereinafter Wright & Miller). Class actions seeking injunctive or declaratory relief—as in the instant case—by their very nature present common questions of law or fact. 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil § 1763. Commonality also exists when plaintiffs allege that a defendant has acted or is acting uniformly regarding a class. *Haitian Refugee Center v. Smith*, 676 F.2d at 1033. The class of plaintiffs in

this case allege that they were denied temporary residence status because the defendants imposed an illegal burden of proof that the applicants were unable to meet. Such an allegation is sufficient to meet the commonality and typicality requirements of Rule 23(a)(2) and (3). *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986) (claims actually litigated must simply be those fairly represented by the named plaintiffs).

Finally, the court rejects the defendants' argument that the plaintiffs did not adequately describe the class. The defendants' very requirements for eligibility under the SAW program identify the class members with sufficient particularity for this court to determine whether a SAW applicant is a member. Therefore the class certified shall consist of all persons who have applied for, or will apply for, adjustment to lawful residence under the Special Agricultural Worker ("SAW") program within the eighteen month period and who have been or will be denied such status by the INS within this circuit because of the defendants' unlawful practices and policies.

PRELIMINARY INJUNCTION

The plaintiffs seek preliminary injunctive relief under Fed. R. Civ. P. 65(a), the purpose of which is to prevent irreparable injury and preserve the court's ability to render a meaningful decision on the merits. *United States v. Alabama*, 791 F.2d 1450, 1459 (11th Cir. 1986). Because the application period under the SAW program terminates on November 30, 1988, preliminary injunctive relief is necessary to ensure that a remedy will be available. *Id.* (citing *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984)). With full understanding that a preliminary injunction is an extraordinary and drastic remedy, the grant of which is exceptional, this court, nevertheless, finds that the cirmumstances before it require such relief.[26]

To be entitled to injunctive relief, the plaintiffs must establish four factors: (1) substantial likelihood that they will prevail on the merits; (2) they will suffer irreparable injury if the injunction is not granted; (3) the threatened harm to the plaintiffs outweighs the potential harm to the defendants; and (4) the public interest will not be harmed if the injunction should issue. *United States v. Alabama*, 791 F.2d at 1459 n.10; *Johnson v. Department of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984); *Cate v. Oldham*, 707 F.2d 1176, 1185 (11th Cir. 1983); *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983).

Likelihood of Success

The plaintiffs allege that the defendants have violated the applicants' due process rights under the Fifth Amendment by the manner in which they are implementing the SAW program. The plaintiffs cite what they allege to be an improper burden of proof in establishing eligibility under the program, defendants' failure to publish new rules governing SAW applications, practice or denying non-frivolous claims at the LOs, and failure to advise applicants of specific reasons for denial of their applications.

The Supreme Court has recognized that a constitutionally protected liberty or property interest may be

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[26] The grant or denial is a decision within the sound discretion of the district court. *Lambert*, 695 F.2d at 539 (citing *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 332 (5th Cir. 1981).

created by positive rules of law enacted by the federal government and creating a substantial entitlement to a particular government benefit. *Haitian Refugee Center v. Smith*, 676 F.2d at 1038. In *Smith*, the Fifth Circuit found a constitutionally protected right to petition the federal government for political asylum in federal regulations establishing asylum procedures. In the case before this court, the applicants have a constitutionally protected right to seek SAW status under IRCA and the resultant regulations. *Smith* recognized a problem that also faces this court—that fundamental fairness, the very essence of due process, is violated when the government creates a right to petition and then makes it utterly impossible to exercise that right. 676 F.2d at 1039.

Thus the individual plaintiffs have been afforded the right to seek temporary residency in this country through the congressionally created SAW program. Congress intended that the program be liberally applied to encourage undocumented farm workers to come forward and seek legalization. The program was created in a way to circumvent the well recognized problem of documentation that exists for migrant worker [*sic*]. The evidence before this court strongly suggests that, despite congressional directives, applicants are being required to produce exactly what they cannot, i.e., payroll records.

The Supreme Court has repeatedly emphasized that, not only must an aggrieved party be given the opportunity to "some form of hearing" prior to being deprived of a protected interest, the hearings must be conducted "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The applicants in this case were expected to defend their applications against inferences of "suspected fraud," "lack of credibility," or "inconsistencies" to interviewers who did not speak their language and were not schooled in their culture. Applicants were not advised when their applications were recommended for denial, and were deprived of the opportunity to rebut any adverse inferences drawn from their interviews. Hundreds perhaps thousands of applicants received denial notices stating only that submitted affidavits were "not substantiated by any additional credible evidence such as piecework receipts or employers' daily records." They were misinformed about the time within which they were required to appeal an adverse decision, and not informed at all of where to submit an appeal. It is difficult to find that the above circumstances constituted a "meaningful" opportunity to be heard.

Under section 210(a)(1) of the INA, as amended by IRCA, 8 U.S.C. § 1160(a)(1), the Attorney General *"shall"* adjust the status of an alien who creates a just and reasonable inference of eligible employment and meets the other requirements of the statute. The Attorney General must also grant an application when a just and reasonable inference is shown unless the reasonableness of the inference is negated a "showing." 8 U.S.C. § 1160(b)(3)(B)(iii). Congress intended that the standards outlined in the case law interpreting the Fair Labor Standards Act be applied to the SAW program. *See* n.13 *supra*. *See, e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (employee must produce sufficient evidence from which the amount of time worked may be determined as a just and reasonable inference and the burden then shifts to the employer to negate

the reasonableness of the inference).[27] In *Belieze v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330-31 (5th Cir. 1985), the court recognized that a just and reasonable inference may be established through testimony of other employees. *See also Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973). In *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3rd Cir. 1984), the court, in a footnote, chided the defendants who erroneously contended that no case has permitted the testimony of plaintiffs alone to satisfy the burden *Anderson* places upon employees by pointing to *Marshall v. Van Matre*, 634 F.2d 1115, 1119 (8th Cir. 1980) and *Mitchell v. Williams*, 420 F.2d 67, 70-71 (8th Cir. 1969). *See Williams*, 747 F.2d at 128 n.13. The court, in rejecting the defendant's argument that testimony alone was insufficient to create a just and reasonable inference, remarked that when "employees are migrant farm workers, it is difficult to imagine what other evidence the defendant would require [the farm workers] to produce." 747 F.2d at 128 n.13.

The defendants in the present case are rejecting the "just and reasonable" inference established by the applicants' proffered affidavits on the basis of arbitrary credibility determinations that rest partly on suspicion of widespread fraud. The statute, however, requires that the applicant's "just and reasonable inference" be countered by "a showing that negates the reasonableness of the inference," and not the mere suspicion of wrongdoing.

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[27] In *Smith*, the court conceded that the right to petition for asylum is "a fragile one," but nevertheless a valuable one to its possessor. 676 F.2d at 1039. Likewise, in this case, the right is invaluable to the applicants seeking residency in this country.

Irreparable Injury

The key word in the determination of the injury that will result from a denial of a motion for preliminary injunction is "irreparable." *United States v. Jefferson*, 720 F.2d 1511 (11th Cir. 1983). An injury is "irreparable" for purposes of a preliminary injunction only if it cannot be undone through monetary remedies. *Cate v. Oldham*, 707 F.2d 1176; *Deerfield Medical Center*, 661 F.2d 328. *See also Jets Service Inc. v. Hoffman*, 420 F. Supp. 1300 (D.C. Fla. 1976) (a recognized, legitimate interest that will vanish if not preserved constitutes irreparable injury).

The injury to the individual plaintiffs and the class involves a denial of temporary residency that will be adjusted to permanent residency within two years. This court cannot say that any monetary remedy would compensate for the loss of the benefits afforded by United States residency. The opportunity offered to the applicants is of limited duration, limited by the eighteen month application period ending on November 30, 1988.

SAW applicants whose applications were denied at the LO and those applicants who failed to appeal timely denials because of improper notices lack work authorization and thus a means of livelihood. The plaintiffs, HRC and MRS are unable to provide their members with the services that form the core of the organizations' functions.

Balance of Interests

The possible harm to the plaintiffs must be balanced against the possible harm to the defendants. In a case which involves a government agency, this factor is often intertwined with the public interest considera-

tion. *See Baker v. School Board of Marion County*, 487 F. Supp. 380, 383 (M.D. Fla. 1980). The defendants allege that the administrative burden that will result from the grant of injunctive relief outweighs the interests at stake. This court does not agree. Although it is true that the relief the plaintiffs seek involves necessary administrative expense and time, the loss to the plaintiffs is of such a magnitude to justify the additional burden. This court may use a sliding scale analysis, in which a strong showing of one factor may lessen the requirement for another. In addition, the overriding prerequisite is irreparable injury without an adequate remedy at law. *Baker v. School Board*, 487 F. Supp. at 383 citing *Sampson v. Murray*, 415 U.S. at 61, 88-89 (1974)). Plaintiffs who have been improperly denied a change of status have suffered a very great loss as will those possibly denied in the future. When the program concludes on November 30, 1988, the chance to qualify under the program is gone. There exists no remedy at law that this court is aware of to compensate for this loss and therefore this court finds that the injunctive relief requested by the plaintiffs is proper.

It is thus the considered decision of this court that the class of plaintiffs described in this decision be certified and the injunctive relief be granted. An appropriate preliminary injunction order shall be entered.

DONE AND ORDERED at Miami, Florida, this 22nd day of August, 1988.

/s/ C. Clyde Atkins
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-1066-CIV-ATKINS

HAITIAN REFUGEE CENTER, INC., ET AL., PLAINTIFF

v.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, ET AL., DEFENDANTS

[Filed Aug. 22, 1988]

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE is before the court on the plaintiffs' motion for a preliminary injunction. After reviewing all of the submitted memoranda, after an extensive hearing, and after reviewing post hearing memoranda, it appearing that the plaintiffs and members of their class will suffer irreparable harm absent the preliminary relief sought because they will be denied the ability to earn a living and to support themselves and will be subject to deportation by the defendants, it is

ORDERED AND ADJUDGED as follows:

The defendant Alan C. Nelson, as Commissioner of Immigration and Naturalization Service and the United States Immigration and Naturalization Serv-

ice ("INS") and all persons acting by, through, or subject to their control or supervision, shall comply with the following:

(1) In those cases in which the INS issued notices of denial which did not comply with the requirements of 8 C.F.R. § 103.3(a) because they did not advise the applicant of the correct procedure for appeal or did not provide specific reasons for denial, the INS shall vacate the denials and issue new notices of denial which comply with 8 C.F.R. § 103.3(a);

(2) In those cases in which the INS considered evidence adverse to the applicant of which the applicant was unaware, contrary to 8 C.F.R. § 103.2(b)(2), the INS shall vacate the denials, afford the applicant an opportunity to examine the adverse evidence, to rebut it, and to offer additional evidence before rendering a decision;

(3) In those cases which the INS denied based in whole or in part on the fact that the applicant failed to submit payroll records or piecework receipts, the INS shall vacate the denials and reconsider the cases in light of the proper standard of proof which will require the government to present evidence to negate the just and reasonable inference created by the affidavits and other documents submitted by the applicant;

(4) The INS shall vacate those denials issued by the Legalization Offices during the period June 1, 1987, to March 29, 1988, unless the government can show that the applications were clearly frivolous based upon the documentation submitted by the applicant or that the applicant admitted fraud or misrepresentation in the application process;

(5) The INS shall issue temporary work authorization to all class members pending the final outcome

of the proceedings in this case and a final decision on the merits of their individual cases;

(6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary;

(7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, co-workers, and any other individuals who may offer testimony in support of the applicant;

(8) The interviewers shall be directed to particularize the evidence offered, testimony taken, credibility determinations, and any other relevant information on the form I-696.

This order shall remain in effect pending further order of this court. The plaintiffs are directed to post security in the amount of $500 by 4 p.m. on August 25, 1988, in accordance with Fed. R. Civ. P. 65(c).

DONE AND ORDERED at Miami, Florida this 22nd day of August, 1988

/s/ C. Clyde Atkins
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5934

HAITIAN REFUGEE CENTER, INC., a not-for-profit corporation, ROMAN CATHOLIC DIOCESE OF PALM BEACH, MARIE GIZELE ANGRAND, GERMAINE CADET, ROSITA DELVA, DIEUMERCIE DESIR, JOSEPH SAINTIL DIEUDONNE, GERARD HENRY, MARIE FRANCE JEAN-PHILIPPE, NOVAMISE JULIEN, FRANCKLIN JOSEPH, SYLVIA LINDOR, PLAINTIFFS-APPELLEES

versus

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, PERRY RIVKIND, District Director, Immigration and Naturalization Service, District Office Number 6, KENNETH PASQUARELL, District Director, Immigration and Naturalization Service, District Office Number 26, WILLIAM CHAMBERS, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region, IMMIGRATION AND NATURALIZATION SERVICE, Department of Justice, RICHARD NORTON, Associate Commissioner for Examination, Immigration and Naturalization Service, DEFENDANTS-APPELLANTS

[Filed Oct. 10, 1989]

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARINIG AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion May 23, 1989, 11 Cir., 198—,
—— F.2d ——)

Before RONEY, Chief Judge, VANCE, Circuit Judge and KAUFMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

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* Hon. Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1105a provides in pertinent part:

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 6 months after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 60 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

* * * * *

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

8 U.S.C. 1160 provides in pertinent part:

§ 1160. Special agricultural workers

(a) Lawful residence

(1) In general

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien meets the following requirements:

(A) Application period

The alien must apply for such adjustment during the 18-month period beginning on the first day of the seventh month that begins after November 6, 1986.

(B) Performance of seasonal agricultural services and residence in the United States

The alien must establish that he has—

(i) resided in the United States, and

(ii) performed seasonal agricultural services in the United States for at least 90 man-days,

during the 12-month period ending on May 1, 1986. For purposes of the previous sentence, performance of seasonal agricultural services in the United States for more than one employer on any one day shall be counted as performance of services for only 1 man-day.

(C) Admissible as immigrant

The alien must establish that he is admissible to the United States as an immigrant, except as otherwise provided under subsection (c)(2) of this section.

* * * * *

(e) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide a single level of administrative appellate review of such a determination.

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of determination.

(3) Judicial review

(A) Limitation to review of exclusion or deportation

There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

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No. 89-1332

Supreme Court, U.S.
FILED
MAY 17 1990
JOSEPH F. SPANIOL
CLERK

In The

Supreme Court of the United States

October Term, 1989

GENE McNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., *Petitioners,*

v.

HAITIAN REFUGEE CENTER, INC. ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether the district courts are wholly precluded from asserting general federal question jurisdiction, 28 U.S.C. §1331 or general immigration jurisdiction for matters arising under Title II of the Immigration and Nationality Act, 8 U.S.C. §1329, by 8 U.S.C. §1160(e), where organizational as well as individual plaintiffs challenge the constitutionality of INS practices and policies that make meaningful individual review impossible.

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No. 89-1332

In The

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v.

HAITIAN REFUGEE CENTER, INC. ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-17a), is reported at 872 F.2d 1555. The opinion and order of the District Court (Pet. App. 18a-54a, 55a, 57a), is reported at 694 F.Supp. 864.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1989. A petition for rehearing was denied on October 10, 1989 (Pet. App. 58a-59a). On January 3, 1990 Justice Kennedy extended the time within which to file a petition for writ of certiorari, up to and including February 17, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions stated in the Solicitor General's petition (8 U.S.C §§ 1105a, 1160), the fifth amendment to the United States Constitution and 8 U.S.C. §1329 are pertinent to this case and are set forth below:

U.S. Const., Amend, V:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law;. . . .

8 U.S.C. §1329:

> The district courts of the United States have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title. It shall be the duty of the United States Attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with the violation under section 275 or 276 may be apprehended. No suit or proceeding for a violation of any of the provisions of this title shall be settled, compromised, or discontinued without the consent of

the court in which it is pending and any such settlement, compromise or discontinuance shall be entered of record with the reasons therefor.

STATEMENT OF THE CASE

A. The Special Agricultural Worker Program

1. Legislative History and Eligibility Requirements.

As part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, Congress required that the Attorney General grant residency under a Special Agricultural Worker ("SAW") program to alien farmworkers who performed seasonal agricultural services and who otherwise qualified under the Immigration and Nationality Act. 8 U.S.C. §1160 *et seq*. The dual purpose of this program was "to grant . . . residence to agricultural workers – to benefit the workers – and to guarantee growers an ample supply of nondomestic agricultural workers – to benefit the growers." 132 Cong. Rec. H8517 (daily ed. Sept. 26, 1986) (statement of Rep. Mazzoli). The Congress heard extensive testimony on the effects that employer sanctions would have in removing a substantial number of undocumented individuals from the agricultural workforce. The program was designed to respond to the growers' concerns regarding the availability of labor and "at the same time to protect workers to the fullest extent of all applicable federal, state and local laws . . . to provide workers with the option of switching jobs and to provide them with a status that insures that their employment is fully governed by all relevant law without exception." H.R. No. 682, 99th Cong., 2d Sess. 83-84 (1986).

Under the SAW program a farmworker was eligible to become a temporary resident if he or she (1) resided in the United States and performed seasonal agricultural services for at least ninety man-days during the twelve-month period ending on May 1, 1986, and (2) was admissible as an immigrant. 8 U.S.C. §1160(a)(1)(B). To be eligible for the program, the SAW applicant had to apply for adjustment of status to temporary residency during the eighteen month period beginning on June 1, 1987. 8 U.S.C. §1160(a)(1)(A). The

application period for this program, therefore, expired on November 30, 1988. SAW applicants granted temporary residency under the first phase of the program became eligible for lawful permanent residency on December 1, 1989 if they had performed agricultural services for ninety man-days during three consecutive years, or on December 1, 1990 if they performed agricultural services for only one ninety man-day period. 8 U.S.C. §1160(a)(2).

2. The Application Process

The application process for the SAW program began at a personal interview held at a legalization office ("LO"), a local office of the INS authorized to accept and process applications. 8 C.F.R. §210.1(h).[1] The interviewing office could deny the application, recommend that it be denied, or recommend that it be granted. Those applications that were not denied by interviewing officer were forwarded to a regional processing facility ("RPF") for adjudication. If a denial issued either from the LO or the RPF the applicant had to appeal the decision to the legalization appeals unit ("LAU") which makes the final administrative decision on SAW applications. Pet. App. 22a.

The interview process was central to the determination of SAW status. The immigration officer at the LO was asked to determine the credibility of the applicant and the documentation he or she presented regarding eligibility. 8 C.F.R. §§210.2(c)(4)(i) [the applicant must establish to the satisfaction of the examining officer during an interview that his or her claim to eligibility for special agricultural worker classification was credible . . .]; 210.3(b)(2) [the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility]. Moreover, the personal interview was of utmost importance because as the district court found, "farm labor contractors and other agricultural

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[1] Regulations to implement the SAW provisions are codified at 8 C.F.R. parts 103 and 210. 52 Fed. Reg. 16190 *et seq*. and 16195 *et seq*. (May 1, 1987).

employers often do not maintain accurate employment records. [T]his makes it difficult and, in many cases, impossible for a farmworker to produce formal documentation. Farmworkers are likely to be paid in cash by farm labor contractors whose lists of workers are often incomplete." Pet.App. 28a-29a.[2]

The interview is "the only face-to-face encounter between the applicant and the INS allowing the INS to assess the applicant's credibility." Pet.App. 28a. As the INS did not record or prepare a transcript of the interview, the only record created in the case was established on the INS officer's worksheet, Form I-696. Pet. App. 28a. The record created by the INS officer on the I-696 was of paramount importance because the appeal to the LAU was to "be based solely on the administrative record established at the time of the determination on the application" unless there was newly discovered evidence. 8 U.S.C. §1160(e)(2)(B).

Similarly, the judicial review of the administrative process is to "be based solely upon the administrative record established at the time of the review of the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U.S.C. §1160(e)(3)(B). Thus, under petitioners' procedure after the personal interview at the LO, applicants had no other opportunity to present live testimony. The record on appeal is their "paper record", including the I-696 and written documentation, if any. This "record" then

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[2] In passing the SAW legislation Congress was aware of the documentation problem. Congress utilized the standards employed in the Fair Labor Standards Act and granted a presumption to SAW applicants recognizing that there may be "employee loss of records, destruction or falsification of records by employers, and other difficult circumstances where precise evidence of hours worked is lacking." Conference Report, Immigration Reform and Control Act of 1986, H.R. Conf. Ref. No. 1000, 99th Cong., 2d Sess., 97 (1986). The presumption in favor of applicants was formalized in IRCA. 8 U.S.C. §1160(b)(3)(B)(iii).

forms the "sole" basis for review by the RPF, the LAU and ultimately the circuit court. Pet. App. 7a, 28a; 8 U.S.C. §§ 1160(e)(2)(B), (e)(3)(B).[3]

B. The Proceedings Below

On June 13, 1988 this action was initiated on behalf of the Haitian Refugee Center, Inc. ("HRC") the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach ("MRS") and seventeen individuals whose applications for temporary residence under the SAW program had been denied by the Immigration and Naturalization Service. The legal action initiated by plaintiffs "d[id] not challenge any individual determination of any application for SAW status, but rather attack[ed] the manner in which the entire program [was] being implemented, allegations beyond the scope of administrative review." Pet. App. 37a-38a. Similarly, the organizational Plaintiffs HRC and MRS did not seek review of any individual claim. HRC alleged that defendants' actions "directly injures the organization because it makes HRC's work of assisting the Haitian refugee community more difficult and results in the diversion of HRC's limited resources away from members and clients having other urgent needs." Pet. App. 41. MRS similarly alleged "that the Defendants' behavior has discouraged otherwise eligible SAW applicants from seeking counseling and/or filing their claims and MRS is prevented from fulfilling its basic mission of assisting aliens to qualify under IRCA." Pet. App. 41a. As the district court found, HRS and MRS had injury separate and apart from the injury to the Plaintiffs in that they "have concrete programmatic concerns that form an adequate basis for alleging an injury in fact. . . ." Pet. App. 43a.

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[3] The applicant for SAW statutes has no opportunity to reopen the proceedings once the "record" is established on the I-696 by the legalization officer. 8 C.F.R. §103.5 ("motions to reopen a proceeding or reconsider a decision under part 210 . . . of this chapter shall not be considered").

The Plaintiffs' actions sought declaratory, mandatory and injunctive relief for themselves and a class of persons who have applied or will apply for SAW status. The complaint challenged "unlawful practices and policies" of the INS that "imposed an interview procedure which violates the applicants' fifth amendment right to due process by failing to provide interpreters, failing to allow the applicants to rebut adverse evidence, and refusing to allow the applicants to present witnesses on their own behalf." Pet. App. 19a-20a.[4]

The evidence at trial indicated that the denial rate for SAW applicants filed in the State of Florida was approximately twenty-nine percent, almost six times the denial rate for applications filed for amnesty under Section 245A of IRCA. Pet. Ap. 27a at n.9.

On the three issues that the government sought appeal, the court of appeals found that "in enacting the Special Agricultural Worker program, Congress and the Executive Branch have granted aliens a constitutionally protected right to apply for temporary residency as well as a right to substantiate their claims for eligibility." Pet. App. 14a. Despite the constitutionally protected interest and the importance of the interview process, INS did not record or prepare a transcript of the interview. Pet. App. 7a, 28a. The only record of the interview that was used for an appeal was the INS officer's

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[4] The plaintiffs also brought other challenges to INS' policies and practices including the petitioners' reliance on an impermissible standard of proof. As the petitioners acknowledge, they "did not challenge those paragraphs of the preliminary injunction on appeal." Petitioners' Brief at 7 n.5. Notwithstanding petitioners' claim that they continue to appeal the jurisdictional issue with respect to the first five paragraphs of the lower court's injunction, their brief to the Court of Appeals sought appeal only as to issues relating to the interview process. Appellants' Opening Brief at p. 16 n.3. ("Defendants/Appellants have advised Plaintiffs . . . that INS would fully comply with the terms of paragraphs one through five of the injunction which will eventually render moot the first through fifth claims of the complaint"). Indeed, the INS did seek to render these issues moot on August 26, 1988 by issuing a cable requiring the legalization offices in the Eleventh Circuit to utilize new procedures.

worksheet (I-696). The worksheets, however, often contained "very little information about the interview" and in some cases "were completely blank." Pet. App. 8a. As the court of appeals noted, "without any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. 16a. The injunctive relief sought and obtained merely required INS interviewers "to particularize the evidence offered, testimony taken, credibility determinations and any other relevant information on the form I-696" so that a record for review would be available. Pet. App. 57a.

The evidence at trial also revealed that the record of interview "neither identified the name of the interpreter nor indicate[d] whether an interpreter was used." Pet. App. 9a, 27a-28a. Although ninety percent of the applicants at the legalization office spoke either Spanish or Haitian Creole, the INS did not provide interpreters at SAW interviews and did not investigate the qualifications of interpreters provided by the applicants. Pet. App. 9a. At the interview, applicants were expected to defend their application with "interviewers who did not speak their language and were not schooled in their culture." Pet. App. 51a. Under those circumstances, the district court noted that "it is difficult to find that the above circumstances constituted a 'meaningful' opportunity to be heard." Pet. App. 51a.

The third aspect of the Plaintiffs' claim regarded the ability to present witnesses at the LO. Although INS' treatment of the applications "enhances the importance of live witnesses to the application process" the evidence at trial indicated that despite the INS' policy to permit testimony of witnesses, "applicants had been prevented from presenting witnesses . . . [and] some LOs disallowed witness testimony as a general rule." Pet. App. 8a-9a.

The court of appeals affirmed the preliminary injunction of the district court. The court of appeals recognized that "Appellees do not challenge the merits of any individual status determination;" rather, "they contend that Defendants' policies and practices in processing SAW applications deprived them of their statutory and constitutional rights." Pet. App. 11a. The court of appeals specifically noted that "the

individual Plaintiffs here do not seek substantive review of any individual ruling respecting their status, rather, they challenge the adequacy of the procedures employed in the processing of their SAW applications." Pet. App.12a.

In affirming the district court, the court of appeals held that Section 210 of the INA did not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials and that to deprive review "would foster the very delay and procedural redundancy that Congress sought to eliminate." Pet. App. 11a. The court also rejected the government's argument that the Plaintiffs had to exhaust their administrative remedies, finding that "the chances are remote that the INS would have considered substantial revision of the procedures devised for the processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application." Pet. App. 13a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals that the district court was not wholly precluded from reviewing allegations of systematic abuses by INS officials which denied Plaintiffs and their class their constitutional right to due process does not raise significant questions meriting review on certiorari. The decision below is fully consistent with the plain meaning of the statute and prior decisions of this Court.

The decision below creates no significant conflict with the decision of any other court of appeals. Furthermore, in view of the fact that the Ninth Circuit has four similar cases pending before it which, when resolved, will either present a square conflict with the recent decision of the District of Columbia Circuit in *Ayuda v. Thornburgh*, 880 F.2d 135 (1989), or will further illuminate the question of the district courts' jurisdiction to hear challenges to the policies and practices of the INS in administering IRCA, review of this case is premature, and the Court should deny certiorari on the instant petition until the issue can percolate further in the lower courts.

This case has no national significance since the Special Agricultural Worker Program is a one-time-only program whose application period ended on November 30, 1988. Moreover, matters contained in the most important parts of the district court's order are the subject of a settlement agreement under which the petitioners have agreed to provide SAW applicants outside of the Eleventh Circuit with many of the procedural protections contained in the preliminary injunction at issue here.

Finally, resolving the question presented on certiorari will be of little practical significance in either this or any other case. Since the petitioners are not contesting the merits of the court of appeals' decision in affirming paragraphs (6), (7), and (8) of the preliminary injunction, the only question raised by petitioners is whether the district court was precluded from exercising its general federal question jurisdiction by 8 U.S.C. §1160(e). Because respondents' complaint also alleged jurisdiction pursuant to 8 U.S.C. §1329, resolution of the question presented would not dispose of the underlying controversy, nor is it likely to resolve other IRCA-related litigation, currently pending against the INS, since many of those cases, including the cases pending before the Ninth Circuit, also allege alternative jurisdictional grounds.

I. THE DECISION OF THE ELEVENTH CIRCUIT IS FULLY CONSISTENT WITH THE PLAIN MEANING OF §1160(e), THE PRIOR DECISIONS OF THIS COURT, AND THE LEGISLATIVE HISTORY OF IRCA

A. The Plain Language of §1160(e) Precludes Review of Petitioners' Argument that the District Court Lacks Jurisdiction to Review Any Aspect of the SAW Program

Petitioners' whole case rests on their claim that Congress meant to channel all judicial review of any aspect of the SAW program to the court of appeals in the review of a deportation order. IRCA provides that "[t]here shall be no administrative review or judicial review of a determination respecting an application for adjustment of status under this section except

in accordance with this subsection." 8 U.S.C. §1160(e)(1). The subsection requires the establishment of "a single level of administrative appellate review," and provides that "[t]here shall be judicial review of such a denial [of a SAW application] only in the judicial review of an order of deportation under [§106 of the INA]." 8 U.S.C. §1160(e)(2)(A) and (e)(3)(A). Section 106 of the INA provides that a deportation order be reviewed only in the court of appeals. Respondents obviously are not challenging any deportation orders; rather they brought this action in district court to challenge an officially approved program, pattern or scheme of defendants which deprived them of their statutory and constitutional rights. Because the present action simply does not seek "judicial review of a determination respecting an application for adjustment of status", §1160(e) on its face does not apply to this suit.

1. A Constitutional Challenge to Systematic Abuse By INS Officials Does Not Constitute A Review of a Determination Respecting an Application for SAW Status Under §1160(e)

Congress did not say that "any *claim arising* under the SAW program" nor that "any *action taken or decision made*" with respect to the SAW program must be reviewed only in the court of appeals. Rather, the limitation provision of §1160(e) is addressed only to "*a determination* respecting *an application*." 8 U.S.C. §1160(e) (emphasis added). While decisions by local immigration officials in charge of the SAW program not to afford applicants within their jurisdiction the opportunity to present witnesses or not to require competent translation at the interview stage may affect thousands of individual applicants, such a course of conduct is tantamount to "a determination respecting an application" only under a strained and far-fetched interpretation of the statute.

Certainly, Congress did not envision that the Legalization Appeals Unit of the INS ("LAU") would hear constitutional challenges to INS conduct. Just as obviously, respondents

could not have raised their constitutional claims before the LAU because the LAU may only hear cases involving challenges to individual applications for adjustment and must base its review solely on the administrative record established at the time of the determination on the application. 8 U.S.C. §1160(e)(2)(B). The factors to be considered in assessing the constitutionality of the procedures employed – the private interest at stake, the risk of erroneous deprivation and the probable value of additional safeguards, and the fiscal and administrative burdens that the additional procedures would entail – are simply outside the scope of administrative review. Moreover, as the court of appeals found, "the chances are remote that the INS would have considered substantial review of the procedures devised for processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application." Pet. App. 13a. *Cf. Mathews v. Eldridge*, 424 U.S. 319 at 330 (1976).[5]

There is a similar limitation on review before the court of appeals since 8 U.S.C. §1160(e)(3)(B) provides that "judicial review shall be based solely upon the administrative record established at the time of review by the appellate authority . . . " The court of appeals, therefore, could not review a record which did not exist.

Furthermore, respondents' claims could not be raised in the court of appeals in the review of a deportation order since the petitioners have failed to provide for an administrative procedure which would vest exclusive jurisdiction in the court of appeals. This Court has held that only determinations made during and incident to the administrative proceedings conducted by the immigration judge and reviewable by the Board of Immigration Appeals may be reviewed as part of a final order of deportation. *Foti v. INS*, 375 U.S. 217 (1963). Final

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[5] In fact, a review of the decisions of the LAU prior to this action being filed does not reveal a single instance in which an individual determination was reversed because of inadequate translation, or the failure to make an adequate record of the interview, or because the applicant was denied his right to present witnesses at the interview.

orders of deportation thus include discretionary determination made by the Attorney General relating, for example, to the suspension or withholding of deportation, if such determinations are made in the course of a deportation proceeding, *Id.* Conversely, determinations not made in the course of a deportation proceeding are not within the exclusive ambit of the court of appeals. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 211-216.[6]

Under the petitioners' administrative scheme neither the Immigration Judge nor the Board of Immigration Appeals may reopen or review the decision of the Legalization Appeals Unit with respect to a SAW application. 8 C.F.R. §103.3(a)(2)(iii).[7] Thus, a determination on a SAW application will never become part of a final order of deportation and, following the reasoning of *Cheng Fan Kwok*, will not be reviewable under §106(a) of the INA.[8]

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[6] *See also Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978) (asylum decisions by district directors may not be reviewed by courts of appeals under INA §106); *Che-Li Shen v. INS*, 749 F.2d 1469, 1472 (10th Cir. 1984) (application for adjustment of status not reviewable under INA §106 unless denial was part of deportation proceeding).

[7] 8 C.F.R. §103.3(a)(2)(iii) bars the immigration judge from considering any issue related to the denial of a SAW application:

> "No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings."

[8] This is certainly not the result intended by Congress; the fault is not, however, in the statutory scheme but in the manner in which petitioners have implemented administrative review of SAW applications. Nothing in the statute required that the administrative appeal be to the Administrative Appeals Unit. The "single level of administrative appellate review" provided for in 8 U.S.C. §1160(e)(2) could just as easily have been the Board of Immigration Appeals as the LAU. Had petitioners assigned the administrative appellate function to the BIA, then there would be no question that exclusive review of denials of individual applications was vested with the court of appeals.

Petitioners' strained interpretation of 8 U.S.C. §1160(e) is totally at odds with this Court's approach to construing statutory limitations on judicial review adopted in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). In *Michigan Academy*, an organization of family physicians and several individual physicians filed suit in district court challenging a Health and Human Services Department regulation authorizing the payment of Medicare Part B benefits in different amounts for similar physicians' services. The government made exactly the same type of argument as petitioners here, contending that the Medicare Act impliedly foreclosed judicial review of any action taken under Part B because it failed to authorize such review while simultaneously authorizing judicial review of "any determination . . . as to . . . the amount of benefits under Part A."

This Court rejected the government's arguments, holding that the district court had jurisdiction over the plaintiffs' challenge to the reimbursement regulation. The Court reasoned that the provisions detailing how and in what forum an individual can obtain review of a determination as to the amount of benefits "simply [do] not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (emphasis in original). The Court distinguished *Heckler v. Ringer*, 466 U.S. 602 (1984), a case heavily relied upon by petitioners here, as a case seeking review of an amount determination. *Id.* at 677-78 n.7.[9]

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[9] The distinction between *Heckler v. Ringer* and the present case is obvious. *Ringer* presents a very different fact situation and arises under a very different statute from IRCA. In *Ringer*, the Court held that Ringer's cause of action – namely that the Secretary's ruling barring reimbursement for a certain medical procedure was invalid under the Medicare Act – constituted "a claim arising under" the Medicare Act within the meaning of the judicial preclusion provision. 466 U.S. at 621. Unlike the Medicare Act, IRCA nowhere attempts to define and prescribe the method of review for all "claims arising under the Act." Far from providing an analogy for how IRCA should be construed, the broad

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2. Section 1160(e) Does Not Proscribe Challenges to INS Conduct By Organizational Plaintiffs

Michigan Academy also makes clear that even if applicants for SAW status are required to follow the narrow statutory path of limited administrative and judicial review of individual determinations in their cases, such judicial preclusion provisions cannot bar organizations such as HRC and MRS who (like the Michigan Academy of Physicians) will never have claims capable of being processed through the standard review procedure.[10]

While essentially conceding that HRC and MRS meet the test for organizational standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), petitioners argue that the absence of a specific provision in IRCA giving such organizations judicial recourse impliedly precludes their claims. The evidence of Congressional intent to preclude judicial review by organizations is not only not "fairly discernable in the statutory scheme," it is nonexistent. *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984). While petitioners claim that a suggestion of Congressional intent can be found

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terminology employed in 42 U.S.C. §405(h), expressly providing that no action shall be brought under sections 1331 or 1346 of Title 28 to recover on any claim arising under [subchapter A] of the Medicare Act, illustrates that Congress knows how to draft a comprehensive jurisdiction-preclusion provision when it wants to.

[10] *Michigan Academy* was originally remanded to the lower court for further reconsideration in light of *Heckler v. Ringer*, 466 U.S. 602 (1984). 469 U.S. 807 (1984). On remand, the court of appeals specifically addressed the question of whether the Michigan Academy of Physicians, a non-profit corporation, was *entitled to* challenge a Medicare regulation in district court *since* §405(g) administrative review was not available to it, as it was to individual claimants. The court of appeals concluded that *Ringer* did not proscribe challenges to the Medicare Act where the challenge was made by a party other than a claimant for benefits. *Michigan Academy of Family Physicians v. Blue Cross and Blue Shield of Michigan*, 757 F.2d 91, 94 (6th Cir. 1985). The decision was subsequently affirmed by this Court. 476 U.S. 667, 669 (1986).

in the absence of specific provision in IRCA giving organizational plaintiffs standing, there is nothing in the statutory scheme here which is significantly different from the Medicare Act discussed in the *Michigan Academy* case or a hundred other statutes in which organizational standing has been upheld.

Petitioners' contention that the claims of the organizational plaintiffs simply duplicate the claims of applicants is simply not true. The goal of offering capable, informed assistance to Haitian refugees to which, the district court found, HRC and MRS's very existence is devoted, is quite distinct from an applicant's desire to successfully obtain legal status. MRS is a "qualified designated entity" ("QDE"), specifically authorized under IRCA to assist in the preparation and submission of SAW applications. 8 U.S.C. §1160(b)(1)(A), §1160(b)(2); §1255a(c)(1), (c)(2).[11] Both HRC and MRS are discrete legal entities from the aliens they represent and therefore suffer significantly different types of harm as the result of conduct challenged here: not only is their ability to perform their core functions impaired and their credibility in the community they served damaged, but in the case of the QDEs, such as MRS, there is direct financial injury as well.

Having created the special role of the QDEs, it is hardly conceivable that Congress would have prevented them from seeking judicially-mandated relief to protect that role.

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[11] Congress recognized that potential applicants for legalization were members of a "fearful and clearly exploitable" "subclass" within American society, S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985), naturally wary of governmental authority. H. Rep. No. 682, 99th Cong., 2d Sess. 49 (1986). In order to garner a high participation rate in an atmosphere of trust and understanding, *id.* at 73, Congress established QDEs to reach out to the illegal alien community, to encourage and assist them in applying for legalization, 8 U.S.C. §1255a(c)(2). *See* S. Rep. No. 132 at 47, QDEs are required by statute, to act as intermediaries between the INS and the alien community, to counsel applicants, disseminate information about the program and to screen and process applications. *See* 8 U.S.C. §1255a(c)(1)-(4).

3. Insofar as the District Court Only Ordered Prospective Relief, Respondents' Claims Cannot Be Properly Characterized "As Seeking Review of 'A Determination Respecting an Application' for SAW Status."

While petitioners argue throughout their petition that the fact that the district court required the INS to vacate some notices of denial and reconsider the applications under the proper procedures "makes manifest that the complaint's purpose was to achieve, on a mass scale, review and reversal of the INS's denials of SAW applications in particular cases", paradoxically petitioners have chosen not to appeal those provisions of the preliminary injunction which required the reopening of many cases.[12] Instead, the only provisions of the district court's order at issue here are paragraphs (6), (7) and (8) which are wholly prospective in nature and thus could not possibly have effected any prior determination respecting a SAW application.

Paragraph (6) required that the Legalization Offices maintain competent translators. Clearly the interview mandated by the INS regulations is meaningless unless the applicant and the interviewer understand each other, and petitioners acknowledged in their brief in the court of appeals that "it is a requirement of the program that an interpreter be used in every case where the applicant does not understand the adjudicator." Appellants' Opening Brief at 11. Similarly the right to present witnesses at the interview mandated by paragraph (7) was clearly contemplated by the INS regulations, and again petitioner admitted below that "the general rule followed by the INS is that SAW applicants can bring witnesses to testify on their behalf." Appellants' Opening Brief at 11.

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[12] Petitioners advised plaintiffs and the district court that the INS would fully comply with the terms of paragraphs 1 through 5 of the injunction which will eventually render moot the First through Fifth Claims of the Complaint. Appellants' Opening Brief at 16. Not only did petitioners acquiesce in the relief ordered in paragraphs (1) through (4) of the preliminary injunction, they subsequently voluntarily extended those provisions to cover all 13 states in the INS Southern Region.

Paragraph (8) of the injunction directs the INS interviewers to "particularize the evidence offered, testimony taken, credibility determinations and any of the relevant information on the form I-696 interview sheet. As the court of appeals noted "[w]ithout any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. at 16a.

The importance of these basic procedures to the proper adjudication of SAW applications is obvious, and petitioners do not challenge that aspect of the judgment here.[13] It is equally obvious that the implementation of these procedures prospectively neither reverses a denial of a SAW application nor dictates the outcome of a particular case.

B. There Was No Legislative Intent to Preclude Constitutional Challenges to INS Conduct in Administering the SAW Program.

Petitioners contend there is no evidence that Congress intended the district courts to entertain constitutional

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[13] *See* p. 11 fn.7, Petitioners' Brief where petitioners explain their decision not to seek review of the holdings on the merits. Respondents would take issue with petitioners' further statement that the court of appeals misapplied the multifactor analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), because it did not give consideration to the government interest "in retaining the current procedures," and that it "overrated the risk of error in the 'generality of cases'." In the first place, the court of appeals specifically found it unnecessary to consider the third *Mathews* factor because the INS procedures already contemplated what the provisions of the injunction require, a point conceded by petitioners themselves, as noted above. Pet. App. 16a. Second, petitioners' use of statistics to prove that the procedures were unnecessary is disingenuous at best. While it is true that over 90% of the SAW applications thus far adjudicated nationwide have been approved, that proves little, because as of January 9, 1990, approximately 53% of the SAW applications filed remained unadjudicated. A far better measure of the risk of error can be obtained from an examination of the 20,278 cases reopened within the Eleventh Circuit pursuant to the preliminary injunction; to date more than 57% of these cases have been reversed upon readjudication under the proper procedures.

challenges to INS conduct in administering the SAW program. However, the real question is not whether there is evidence that Congress specifically authorized review of agency action, since under this Court's holding in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967) such reviewability is to be presumed, but whether there exists clear and convincing evidence of a contrary intent. Evidence regarding intent to restrict reviewability must consist of " 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is fairly discernable in the detail of the legislative scheme." *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 673 (1986). *Accord, Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988).

Petitioners essentially proffer only one argument based on IRCA's legislative history. They contend that since the Senate abandoned a strict Senate provision precluding all judicial review of all aspects of the legalization program, by class action or otherwise, and acceded to the House provision which specifically provided for limited judicial review of denials of SAW applications, Congress could not have intended to open the door to the kind of action brought here. As a general matter, this Court has held that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Laboratories, supra* at 141. Here, the evidence clearly points the other way; Congress specifically rejected a broadly worded provision which clearly would have barred the present suit for a much narrower one.[14] "Few principles of statutory construction are

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[14] The bill in question, S. 1200, did not even contain a SAW program. S. 1200 would have established a general legalization program and explicitly provided that "there shall be no judicial review (by class action or otherwise) of a decision or determination under this section" and further provided that an alien denied adjustment of status under this

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more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1218-19 (1987).

The language and legislative history of IRCA indicate that what Congress really intended in enacting §1160(e) was to foreclose aliens from flooding the courts to seek premature review of applications – *i.e.*, review of the INS' determination of the facts of each case and its application of the law to those facts before deportation hearings were concluded. The exercise of jurisdiction over this case is in no way inconsistent with that goal.[15]

Both the district court and court of appeals recognized that the government's argument that §1160(e) precludes a federal district court from exercising general federal question

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legalization program "may not raise a claim concerning such adjustment in any proceedings of the United States or any State involving the status of such alien. . . ." S. 1200, 99th Cong., 2d Sess., §202(f)(1985). H.R. 3810 did provide for a SAW program and as passed by the House contained what is now 8 U.S.C. §1160(e). The Conference substitute adopted the House provision including the provisions with respect to judicial review. See H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 96 (1986).

[15] Sections 1160(e)(2)(B) and (e)(3)(B) require that both administrative and judicial review of a SAW determination "be based solely upon the administrative record . . . " However, as the court of appeals correctly noted, "[w]ithout any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. 16a, *citing Kent v. United States*, 383 U.S. 541, 561 (1966) ("Meaningful review requires that the reviewing court should review.") Where an agency's factfinding procedures are inadequate, leading to a deficient record, courts may be forced to undertake *de novo* review. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 412, 415 (1971). Thus, postponing judicial resolution of plaintiffs' claims until individual SAW applicants have been placed in deportation proceedings and exhausted their appeals to the BIA, would foster the very delay and procedural redundancy that Congress sought to eliminate in passing §1160(e).

jurisdiction over an action alleging a pattern or practice of procedural due process violations by INS in its administration of the SAW program is essentially the same argument which the INS has made with respect to 8 U.S.C. §1105(a) and which has been rejected by three circuit courts. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1989) (en banc), *aff'd*, 474 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986).[16]

Petitioners seek to distinguish these cases by claiming that in IRCA, Congress employed language even broader than that in Section 1105a, "expressly limiting review of all claims 'respecting an application' under the SAW program to petition for review of an order of deportation." Petitioners' Brief, p. 25. Of course, Congress did not use the words "all claims" and only limited review of "a *determination* respecting an application." Nor does 1160(e) go farther than Section 1105a "by adding an explicit prohibition on any other form of judicial review." Section 1105a explicitly provides that its procedure "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation."

Thus, while admittedly not controlling, the logic of cases, like *HRC v. Smith* and *Jean v. Nelson* is directly analogous to the issue presented here. However, perhaps the true significance of these cases to the present inquiry is that Congress created IRCA's judicial review provisions against a well-established background of case law holding that 8 U.S.C.

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[16] *See also NCIR, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vacated on other grounds*, 107 S.Ct. 1881 (1987) (8 U.S.C. §1252(a) does not bar district court jurisdiction where no review of any individual bond determination is sought); *International Union of Bricklayers v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985) (doctrine of non-reviewability of consular decisions is not applicable where plaintiffs do not challenge a particular decision in a particular case of matters which Congress has left to executive discretion but challenge the underlying procedures.)

§1105a does not preclude broad-based regulatory challenges. When adopting a new law incorporating sections of a prior law, Congress can be presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782, n.15 (1985),[17] and to adopt that interpretation when it incorporates the prior law without change. *Id.*[18]

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[17] *See also Lorillard v. Pons*, 434 U.S. 575, 580-581, (1978); *Bob Jones University v. United States*, 461 U.S. 574, 601-602 (1983); *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982).

[18] Moreover, there is direct evidence of Congressional knowledge and endorsement of the "pattern and practice" exception to §1105a. In 1983, when the Senate was debating judicial review of asylum applications as part of an immigration reform bill, the following colloquy occured regarding a provision which would make the provisions of chapter 158 of title 28 the sole and exclusive procedure for the judicial review of final orders of exclusion or deportation notwithstanding 8 U.S.C. §1329 and 28 U.S.C. §1331:

> MR. BIDEN: [W]ith regard to section 123(a)(2), my understanding is that the language in that section is intended to make clear that it establishes the sole basis for reviewing final orders of deportation or exclusion. There is no intention to overturn any cases provided for judicial review, other than final orders, in matters of pattern and practice when that is appropriate or in the following cases:
>
> Haitian Refugee Center v. Smith, 676 F.2d 103 (5th Cir. 1983).
>
> Louis v. Nelson, No. 82-5772 (11th Cir. dec. Apr. 12, 1983).
>
> Orantes-Hernanez v. Smith, 541 F.Supp. 351 C.D. Ca. 182.
>
> Is my understanding correct?
>
> MR. SIMPSON: Yes, Mr. President. The reference to section 279 of the Act and to section 1331 of title 28 is simply to make clear that they do not provide a basis for district court review of final orders.

129 Cong. Rec. at S12857 (May 18, 1983).

Ironically, petitioners seek to distinguish *UAW v. Brock*, 477 U.S. 274 (1986) in which this Court held that the judicial review provisions of the Trade Act of 1974 regarding trade readjustment allowance benefits did not bar a union's federal district court challenge to a Trade Act regulation relating to these benefits, on the grounds that the statue considered there was passed against a backdrop of prior court decisions recognizing the availability of review under similar statutory schemes. Petitioners simply ignore the fact that a similar contemporary legal context existed when Congress passed IRCA.

The very fact that Congress implemented judicial review of legalization denials through the pre-existing statutory structure of 8 U.S.C. §1105a – without further restriction of or change to that section – establishes that Congress did not seek to alter legislatively the case law on §1105a with respect to IRCA.

II. THERE IS NO CLEAR AND SUBSTANTIAL CONFLICT BETWEEN THE D.C. AND ELEVENTH CIRCUITS OVER THE QUESTION OF WHETHER THE DISTRICT COURTS ARE WHOLLY PRECLUDED BY §1160(e) FROM HEARING CONSTITUTIONAL CHALLENGES TO INS POLICIES AND PRACTICES WHICH DENY APPLICANTS A MEANINGFUL OPPORTUNITY TO BE HEARD.

There is no clear and substantial conflict with the decision of the United States Court of Appeals for the District of Columbia in *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989). In *Ayuda*, a number of organizations and five individual plaintiffs challenged the INS' interpretation of the "known to Government" provision of 8 U.S.C. §1255a(a)(2)(B). 8 U.S.C. §1255a(a)(2)(B) provides that applicants for IRCA's legalization program who are "nonimmigrants" (*i.e.*, persons who entered the United States lawfully prior to 1982 for a temporary period) must have violated restrictions on their nonimmigrant status as of January 1, 1982, and must establish that their resultant "unlawful status was known to the Government as of [January 1, 1982]."

In May 1987, the INS issued regulations that narrowly defined "known to the Government" to require the alien's presence to have been known to the INS prior to January 1, 1982. 52 Fed. Reg. 16206 (1987); 8 C.F.R. §245a.1(d) (1987). The district court in *Ayuda v. Meese*, 687 F.Supp. at 661-63 rejected the INS's definition of the phrase "known to the Government" as violative of the clear statutory language and declared the INS's regulation to be contrary to law. *Id.* at 666. Subsequently, a panel of the D.C. Circuit in a 2-1 decision, found that the judicial review provisions of the legalization program at 8 U.S.C. §1255a(f) precluded district court review. The majority also held in the alternative that the part of the policy challenged was not ripe for review.

The most obvious distinction between the *Ayuda* case and this one is that the SAW program and general legalization programs contained in the IRCA have differing purposes and the provisions governing judicial review, while essentially the same, are set forth in separate sections of IRCA.[19] At least technically there is no conflict between the two circuits since the two distinct statutory provisions are involved.

A much more significant distinction exists, however. The *Ayuda* case is essentially an APA challenge to a INS-promulgated regulation on statutory grounds, whereas the issue presented here is whether the INS's practice and policies in administering the SAW program violated the Fifth Amendment right to due process.[20] The difference goes directly to

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[19] The two provisions differ in that 8 U.S.C. §1160(e) does not specifically preclude judicial review of late filings and authorizes judicial review of SAW denials in the context of review of orders of exclusion, as well as orders of deportation.

[20] While the complaint in *Ayuda* asserted a constitutional claim – that the regulation, and the INS's policies and practices pursuant to that regulation violated due process, the district court in *Ayuda* did not reach the issue of whether the regulation and the practices and procedures of the INS violated the Constitution. Nor did the D.C. Circuit address the constitutional claim. By contrast, the Court of Appeals for the Eleventh Circuit held that SAW applicants must be accorded the protections of due

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the showing that must be made by the government to overcome the presumption in favor of judicial review. As this Court emphasized in *Johnson v. Robison*, 415 U.S. 361 (1974) "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id.*, at 373-374. *See also Weinberger v. Salfi*, 422 U.S. 749 (1975). In cases such as this one involving constitutional claims, the showing that must normally be made to overcome the presumption in favor of review is heightened "in part to avoid the serious constitutional question" that would arise if a federal statute were to deny any judicial forum for a colorable constitutional claim. *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988), citing *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 681 n.12 (1986).

Another important difference between *Ayuda* and this case is that whereas the *Ayuda* plaintiffs challenged an INS regulation as violative of the statutory language and purpose of the IRCA, here plaintiffs were basically challenging the INS's failure to follow its *own regulations and procedures*. Thus, the court of appeals specifically found that the relief ordered by the district court required "no more than is required by IRCA, its accompanying regulations and INS procedures." Pet. App. 15a-16a. Quite apart from the constitutional violations, the district court properly exercised its jurisdiction under 8 U.S.C. §1329 by ordering the INS to adhere to its own regulations and procedures. *See HRC v. Smith*, 676 F.2d 1023, 1041, fn. 48 (5th Cir. 1982), *citing United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).[21]

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process and that under the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Landon v. Plasencia*, 459 U.S. 21 (1982) the district court did not abuse its discretion in granting the preliminary injunction, a holding that petitioners do not challenge here.

[21] These differences are highlighted by the courts' treatment of the parties to the litigation. As the *Ayuda* case focused on the proper interpretation of the phrase "known to the Government" once the district

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Even if one were to accept petitioners' view that the decision below is in conflict with the decision in *Ayuda, Inc. v. Thornburgh*, the impact of whatever conflict exists is narrowly confined and not likely to have continuing future consequences since, as petitioners acknowledge, both the legalization program and the SAW programs "have largely concluded their first phase." Moreover, the issue is simply premature for this Court's review, since a number of other cases presently pending before the Court of Appeals for the Ninth Circuit may present a square conflict with the result in *Ayuda* and in any case, will more thoroughly delineate the nature of the problem.[22]

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court found that the organizational plaintiffs had standing, there was no need for the district court to address the question whether the individual plaintiffs had standing. Although the individual plaintiffs moved for class certification the district court did not act on the motion, and no class has been certified. Here, by contrast, the district court and court of appeals recognized the standing of the individual plaintiffs to challenge the adequacy of the procedures employed in the processing of their SAW applications, and the district court certified a class of all SAW applicants within the Eleventh Circuit who have been or will be denied SAW status by the INS because of the defendants' unlawful practices and policies.

[22] The cases before the Ninth Circuit are *Catholic Social Services v. Thornburgh*, No. S-86-1343-LKK (E.D. Cal. June 10, 1988), appeal pending, Nos. 88-15046, 88-15127, 88-15128 (9th Cir. argued Nov. 18, 1988); *LULAC v. INS*, No. 87-4757-WDK (C.D. Cal. 1988), appeal pending, No. 88-6447 (9th Cir.); *Immigrant Assistance Project v. INS*, 709 F.Supp. 998 (W.D. Wash. 1989), appeal pending, Nos. 89-35345, 89-35593 (9th Cir.); *Zambrano v. Thornburgh*, No. 5-88-455 EJG (E.D. Cal. August 9, 1988), appeal pending, Nos. 88-15438, 88-15533 (9th Cir.). In each of these cases, the government has raised the same issue present in the *Ayuda* case – whether 8 U.S.C. §1255a(f) precludes the federal district courts from exercising general federal question jurisdiction over challenges to INS rules and policies.

The Ninth Circuit has referred the jurisdictional issue in the *LULAC*, and *Zambrano* to the panel in *Catholic Social Services v. Thornburgh*, where the case has already been argued.

Since these cases if affirmed by the Ninth Circuit would present a square conflict with the holding in the *Ayuda* case, respondents urge the Court to deny the present petition.

III. THIS CASE HAS NO PRACTICAL SIGNIFICANCE SINCE GRANTING REVIEW IS UNLIKELY TO AFFECT THE OUTCOME OF A SINGLE SAW APPLICATION OR RESOLVE CASES PENDING IN OTHER CIRCUITS

A. This Case May Become Moot Before It Can Be Decided

Contrary to the government's position, the resolution of the jurisdictional issue would be of very limited, if any, practical significance. The last date for filing an application for adjustment under the SAW program was November 30, 1988. One group of SAWS (those who worked 90 man-days in each of the three years ending on May 5, 1984, 1985 and 1986) are already eligible for automatic adjustment to permanent resident status. The portions of the district court's order which the government has appealed require the government to afford applicants certain protections at the *interview* stage of the legalization process, measures which the government does not contest here. Those interviews have largely been completed.[23] In fact, by the time this Court could consider this case, it is quite possible that the case will be moot as to the issues raised by paragraphs (6), (7) and (8) of the preliminary injunction.[24] Thus, rather than affecting tens of thousands of

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[23] On May 17, 1989, Commissioner Nelson of the INS stated that the Service had projected that *all* interviewing of SAW applicants would be completed by June 30, 1989, with final processing finished by December 31, 1989. Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 400, 403 (1989) (statement of Alan C. Nelson, INS Commissioner).

[24] Respondents have been informed by petitioners that they are extending the protections of paragraphs (6)(7) and (8) to those individuals

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applications as is suggested by the government, it is very likely that the outcome of this case will not affect any of the determinations made on SAW applications within the Eleventh Circuit.

Nor is the outcome of this case likely to have great practical significance in terms of the administration of the SAW program outside of the Eleventh Circuit. About 70% of the SAW applicants reside in the INS Western and Northern Regions. These applicants are covered by a settlement agreement entered into by petitioners in a class action suit similar to this one. Under the terms of the settlement in *United Farm Workers of America (AFL-CIO) v. INS*, No. S-87-1064-JFM (E.D. Cal. filed July 22, 1987), all SAW denials in the INS' Northern and Western regions are to be re-examined to assure conformity with the procedures agreed upon by the petitioners and the plaintiffs there. These procedures are also to apply to all applications awaiting final processing. Obviously, the outcome of this case will not affect the terms of settlement in the *United Farm Workers* case. Only one SAW case remains pending which would be directly affected by this Court's decision. In *Ramirez-Fernandez v. Giugni*, No. EP-88-CA-389 (W.D. Tex., filed Nov. 25, 1988), plaintiffs brought a class action on behalf of SAW eligible aliens in Texas and New Mexico seeking injunctive and declaratory relief similar to that in *Haitian Refugee Center v. Nelson*. The district court denied plaintiffs' request for a preliminary injunction when the INS voluntarily agreed to extend the actions required under paragraphs (1), (2), (3) and (4) of the preliminary injunction issued in *HRC* to all SAW applications at the

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whose cases had been reopened pursuant to the district court's order and who have been subsequently furnished notices of adverse evidence, by affording them the opportunity for a second interview. As of December 6, 1989, this measure affects approximately 3,554 individuals within the Eleventh Circuit. It should be noted that the government took this step on its own volition and that such relief was not specifically required under the district court's order. Respondents are unaware as to whether any individuals have requested a second interview.

Dallas Regional Processing Facility which were filed in the thirteen state area of the Southern Region. Since, again, these measures have now been carried out, even were the INS to rescind its acceptance of the *HRC* standards throughout the Southern Region, review by this Court would have little practical effect.

B. While Petitioners Have Sought Review With Respect to General Federal Question Jurisdiction, Both the Present Case and Other IRCA-Related Cases Have Asserted Other Jurisdictional Grounds

In addition to federal question jurisdiction under 28 U.S.C. §1331, respondents' complaint also asserted jurisdiction under 8 U.S.C. §1329, which grants the district courts jurisdiction of all causes arising under Title II of the Immigration and Nationality Act, "notwithstanding any other law. . . ." Since the question presented by the instant petition is directed only at whether the district courts have general federal question jurisdiction, resolution of the question presented would not dispose of the underlying controversy.[25]

Petitioners cite five cases as examples of cases which would be impacted by the Court's decision on the issue presented in this case. Following the district court's decision in *Doe v. Nelson*, 703 F.Supp. 713, 720-722 (N.D. Ill. 1988), the INS issued a wire rescinding the regulation challenged in that case and reopening cases denied on the basis of that rule. The INS has not appealed the district court's ruling. Each of the four remaining cases cited by petitioner, as previously noted, is on appeal to the Ninth Circuit. In each of these cases, the complaint alleged other jurisdictional grounds beside the one challenged by petitioner here. Even were the

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[25] Petitioners suggest that whatever preclusive effect 8 U.S.C. §1160(e) has would apply equally to 8 U.S.C. §1329. However, it is not at all clear that the more specific grant of jurisdiction to the district courts in 8 U.S.C. §1329 would not require a heightened showing of Congressional intent before it could be overriden by 8 U.S.C. §1160(e). In any case, neither court below addressed the issue.

Court to rule that 8 U.S.C. §1160(a) precludes general federal question jurisdiction, that alone would not resolve these cases.[26]

C. This Court Should Not Grant Petitioners' Request for What Amounts to An Advisory Opinion.

Beyond its desire to obtain an advisory opinion on its jurisdictional theory, it is unclear why the government is even seeking review in this case, where it is not seriously contesting the merits of the lower courts' decisions and where, in any case, reversal is unlikely to affect the outcome of a *single* SAW determination. While this Court decides questions of public importance, "it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted). As the Special Agricultural Worker program winds down, the significance of the issues raised by Petitioner steadily diminishes. Adjustment to permanent resident status under the SAW program is basically automatic and therefore unlikely to generate the need for judicial review that prompted this case. No doubt the courts will continue to be confronted by difficult questions as to the interpretation of

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[26] Nor would granting certiorari in this case address some of the other concerns raised by the government such as its objections to extending the deadlines for aliens to apply for legalization in the *Catholic Social Services v. Thornburgh*, and *LULAC v. INS* cases. That issue is not before the Court in this case. Nor is this a case where a court has ordered detailed revision of the INS's rules. Although petitioner claims that "discovery and fact finding involving legalization issues have been particularly intrusive" the government chose not to seek review of the court of appeals' denial of the petition for mandamus challenging the district court's discovery order. While petitioner has characterized that order as compelling "the INS to produce in discovery up to 20,000 legalization files pertaining to the class members," to date, the only files which have been produced to the respondents are the 17 files relating to individual named plaintiffs. This discovery cannot be said to be either "intrusive" or "burdensome."

statutes which limit judicial review; however, questions regarding the proper interpretation of 8 U.S.C. §1160(e) are not likely to be among them. The circumstances which gave rise to this case are highly unlikely to recur and therefore further review by this Court is unwarranted.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 89-1332

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE PETITIONERS

The jurisdictional issue in this case has profound significance for the administration of the immigration laws. The issue has divided the circuits and has had serious consequences, unintended by Congress, for INS's allocation of resources. Respondents provide no adequate justification for this Court not to resolve that issue.

1. Unlike the court of appeals, respondents at least address the broad language of IRCA, 8 U.S.C. 1160(e)—language that precludes judicial review of "any determination respecting an application for adjustment of status" except in the context of court of appeals review of an order of deportation. But respondents' contention—that this preclusion is subject to an exception for challenges to an asserted "pattern and practice" of conduct by INS—is incorrect as to both the individual applicants and the organizational plaintiffs that filed the complaint in this case. Although most of respondents' arguments on these issues are discussed in our petition, some points warrant a further response.

a. *The individual respondents*. Respondents contend (Br. in Opp. 11) that their due process claims would not be cognizable in review of a deportation order because INS has "failed to provide for an administrative procedure which would vest exclusive jurisdiction in the court of appeals" under 8 U.S.C. 1105a. That argument cannot be squared with the plain text of IRCA.[1] In any event, respondents are wrong about the scope of review under Section 1105a; the inability of an immigration judge or the Board of Immigration Appeals to review denials in the Special Agricultural Worker (SAW) program does not preclude the courts of appeals from reaching such issues. Cf. *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) (Section 1105a comprehends "all matters on which the validity of the final order [of deportation] is contingent").[2]

Respondents also speculate (Br. in Opp. 10-11) that their due process claims could not be addressed in the deportation context because the administrative review mechanisms provided under IRCA would not create a proper record for the court of appeals. But both the district court and the court of appeals discussed the need for translators, witnesses, and particularized records of denials at SAW interviews without adverting to any item of evidence that would have been unavailable in a proceeding under Section 1105a. Pet. App. 14a-17a, 49a-52a. Moreover, if a court of appeals found it necessary to amplify a record in order to adjudicate a constitutional claim, it could accomplish that by remanding the

[1] IRCA expressly states that "[t]here shall be judicial review of * * * a denial [of a SAW application] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160(e)(3)(A).

[2] *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), cited by respondents (Br. in Opp. 12), is no more relevant here than it was in *Chadha*. See 462 U.S. at 938-939.

case to the agency. Cf. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).[3]

Finally, with respect to the claims of individuals, respondents assert (Br. in Opp. 10) that it "strain[s]" the statutory language to apply the words "a determination respecting an application" to the conduct of immigration officials in thousands of interviews. But respondents' complaint simply packages together many INS actions in individual cases and relabels those actions as a "policy." Respondents do not contend that each SAW applicant can assert his or her particular due process challenge in district court without following the course of judicial review prescribed by Congress. Yet, they fail to explain why the language of the statute is rendered inapplicable simply because many such claims are joined together in a class action.[4]

b. *The organizational respondents*. Respondents contend (Br. in Opp. 14-15) that whatever limitations are imposed on individual SAW applicants, the organizational respondents are free to sue in district court on the same legal claims. But this Court rejected a strikingly similar argument

[3] Respondents' failure to acknowledge that their due process claims are ultimately reviewable in the court of appeals leads to their misplaced reliance on *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). Br. in Opp. 13. As we explained in our petition (at 17 n.11), this case, unlike *Michigan Academy*, is *not* a case in which the only alternative to district court review of respondents' constitutional claims is total preclusion of review.

[4] Although respondents do not deny that the complaint sought the reopening of individual cases, respondents note (Br. in Opp. 16-17) that the specific paragraphs of the injunction appealed by the INS ordered only prospective relief. But respondents overlook that our submissions in the court of appeals called into question the jurisdiction of the district court over the entire case. See Gov't C.A. Br. 14 ("[T]he district court lacks jurisdiction over the complaint."); Gov't C.A. Reply Br. 2. Likewise, the court of appeals evidently understood that the district court's jurisdiction over the entire case was at issue. Pet. App. 9a-11a.

in *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984), explaining that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." 467 U.S. at 349. Pursuant to that principle, district courts are not authorized to hear the claims of the organizational respondents in the SAW program because such review would frustrate Congress's purposes in cabining review at the instance of individual applicants. See Pet. 18-19.

Nor do respondents advance their cause by noting (Br. in Opp. 14) that the organizational respondents have alleged Article III injury-in-fact under *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982). That is not the dispositive question here. Rather, the issue is whether Congress intended to authorize the organizational respondents to bring suit based on the legal claims of SAW applicants. Although respondents insist (Br. in Opp. 15) that the claims of the organizational plaintiffs do not duplicate the claims of applicants, they are unable to point to any legal claim that the organizational respondents alone can advance. The *injury* that the organizational plaintiffs allege does differ from the injury alleged for the individual SAW applicants, but that is not relevant to the inquiry under *Block*; that case directs attention to the nature of the *legal claims* asserted. See *Block*, 467 U.S. at 348 (noting that it would "disrupt" the statutory scheme to allow consumers to assert in court "precisely the same exceptions" that handlers must assert administratively).[5]

[5] Contrary to respondents' view (Br. in Opp. 15), the status of respondent Migration and Refugee Services as a "qualified designated entity" (see Pet. 6 n.4) is of no assistance in establishing its right to sue. Indeed, Congress's careful description of the functions of a "qualified designated entity" in IRCA itself, without authorizing such an entity to litigate the claims of aliens, constitutes powerful evidence that no such role was intended.

2. Respondents next argue (Br. in Opp. 17-22) that Congress intended to allow broad-based constitutional challenges in district court, notwithstanding the restrictive approach to judicial review manifested in IRCA. As an initial matter, we disagree with respondents' implication (Br. in Opp. 18) that the requirement of "clear and convincing evidence" to overcome the presumption of judicial review applies when the question is not *whether* Congress intended to allow review, but only *where* and *when* review shall be had. Cf. *Florida Power & Light Co.* v. *Lorion*, *supra* (resolving the question whether review was available in the district court or in the court of appeals without discussing the presumption against preclusion of review). As to individual SAW applicants, the issue before this Court falls into the latter category.

In any event, the statute and its background make clear that judicial review of the claims of SAW applicants is authorized only in the courts of appeals, and is prohibited elsewhere. Review at the instance of the organizations would undermine Congress's intention to "[r]estrict[ ] judicial review to the context of an order of exclusion or deportation." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 99 (1986). Contrary to respondents' assertion (Br. in Opp. 19), Congress's failure to preclude *all* judicial review, as the Senate bill provided, does not undercut the significance of the sharp limitations on review in the legislation that the House and the Senate actually passed.

Respondents assert that Congress's *only* purpose in limiting judicial review was to avoid a flood of individual actions. Therefore, they conclude, that purpose would not be thwarted by allowing district courts to have jurisdiction over sweeping class actions like this one. Br. in Opp. 18-19. But if judicial review in individual legalization cases threatens to disrupt INS and to burden the courts, the disruptive potential of class action litigation magnifies those

problems many times over.[6] It is inconceivable that Congress carefully limited judicial review of individual claims, only to leave a gaping hole for far more intrusive and time-consuming district court actions like this one.

As in the courts below, respondents argue (Br. in Opp. 19-20) that the reasoning expressed in a handful of court of appeals decisions embracing a "pattern and practice" exception to 8 U.S.C. 1105a[7] also applies to IRCA. But IRCA incorporates only the specific form of review (review of final deportation orders) created by Section 1105a; Congress gave no indication in IRCA that it meant to recognize any *exceptions* to that form of review. On the contrary, the IRCA provision, fairly read, *precludes* application to the SAW and legalization programs of the debatable "pattern and practice" decisions under Section 1105a.[8]

3. In our petition, we explained that this Court's review was necessary to resolve the direct conflict between the decision of the court of appeals here and that of the D.C. Circuit in *Ayuda, Inc.* v. *Thornburgh*, *supra*. Pet. 25-28.[9] Respondents struggle unsuccessfully to distinguish the two cases. Br. in Opp. 22-26. First, respondents note that this case involves provisions applicable to the SAW program, while *Ayuda* involves the counterpart provisions applicable to the general legalization program. Given the contemporaneous enactment of the two provisions in the same statute, and their virtually identical language, this distinction is not just "technical[ ]," as respondents themselves admit (Br. in Opp. 23), it is wholly without significance.

Second, respondents observe that this case involves due process claims, while *Ayuda* involves an APA challenge to a rule. But neither the Eleventh Circuit here, nor the D.C. Circuit in *Ayuda*, relied on any such distinction. Indeed, the court of appeals in this case treated the two types of claims identically, ruling in the same sentence that the district court had jurisdiction over respondents' "statutory and constitutional" claims. Pet. App. 11a.[10]

Respondents also make the curious argument that, assuming a conflict exists, this Court's resolution of it would be both "premature" and too late in the lifespan of the legalization programs to serve any useful purpose. Br. in Opp. 8, 25. Quite apart from the inconsistency of these two assertions, respondents are wrong on both counts. Although several other cases now pending on appeal present essentially the same legal issue as we present here, the issue has

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[6] The record here bears out this threat: the INS has been engaged in protracted litigation over document discovery affecting thousands of applications (see Pet. 8 n.6); it has been compelled to reopen and review over 20,000 individual claims; and it has been ordered to hire and train personnel to comply with the court's injunction to provide translators. Many other cases, based on the same jurisdictional theory, have been filed around the country to challenge the details of the legalization programs; these cases have also plunged the district courts into an unaccustomed role of closely supervising an agency's administration of a massive program, often on a level of minute detail. Pet. 28-29; see also *Ayuda, Inc.* v. *Thornburgh*, 880 F.3d 1325, 1337 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018.

[7] See *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), and *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985).

[8] Respondents err in arguing (Br. in Opp. 20) that IRCA's limitation-of-review language finds a counterpart in Section 1105a itself. Section 1105a only identifies the "exclusive" forum for challenging *final* orders of deportation; unlike IRCA, it does not purpose to regulate (let alone bar) review of other types of determinations.

[9] The petitioning legalization organizations in *Ayuda* share our view that the two cases are in conflict. Pet. at 10-13 in *Ayuda, Inc.* v. *Thornburgh*, No. 89-1018.

[10] Moreover, respondents' only reason for drawing a distinction between the two theories—that a stronger showing must be made to *preclude* judicial review of constitutional claims—simply does not apply in this case. As we have explained, IRCA *authorizes* review of respondents' due process claims in the context of a deportation order. See Pet. 16-17.

already been thoroughly aired in the lower courts (see, *e.g.*, the majority and dissenting opinions in *Ayuda*) and is ripe for consideration by this Court.

Moreover, we strongly disagree that the jurisdictional issue is not worthy of this Court's attention because phase one of the legalization programs is nearly over. The litigation over phase one is continuing, and the pending cases raise issues of consequence to INS's ability to move towards completion of its statutory responsibilities. In addition, we do not share respondents' sanguine prediction (Br. in Opp. 29) that phase two of the legalization programs (adjustment to permanent residence) will not generate similar legal challenges.

4. Finally, respondents' attempt (Br. in Opp. 26-30) to downplay the practical significance of this case is misguided.

a. As an initial matter, respondents speculate that the case may become moot before this Court could decide the jurisdictional issues presented in our petition. This fear has no substantial basis.

The pertinent provisions of the injunction require INS to afford applicants the opportunity to present witnesses, to provide translators, and to particularize evidence at interviews of SAW applicants. Although INS has completed the first interview of all SAW applicants within the jurisdiction of the Eleventh Circuit, compliance with the district court's injunction will require INS to afford the opportunity for second interviews to a large number of additional applicants.[11] INS estimates that the process of adjudicating all SAW applications, including reinterviews, will not be completed before September 30, 1991. The district court's injunction will continue to have operative effect throughout that process.[12]

[11] The INS has advised us that, at present, it has identified 3,554 SAW applicants who will be offered new interviews. The INS also believes that upon further review, it will be required to offer a new interview to some 6,500 additional SAW applicants.

[12] Respondents state, without support, that the injunction does not apply to the reinterview process. Br. in Opp. 26-27 n.24. We do not agree; its literal scope covers all SAW applicants being interviewed. See Pet. App. 57a.

Equally important, respondents themselves do not regard the case as moot until INS's full compliance with the injunction is assured. In a June 1989 status report, respondents advised the district court that upon issuance of the court of appeals' mandate, the district court "must decide what further relief may be appropriate with respect to the failure to provide adequate translation at the interviews, failure to make a record of the interview, failure to allow applicants to present witnesses on their behalf[,] and whether or not a hearing on the merits is required with respect to these issues."[13] In light of respondents' commitment to litigate INS's continuing compliance with the outstanding injunction, this controversy is not approaching mootness.

b. Respondents also suggest (Br. in Opp. 28) that the resolution of the jurisdictional issue raised in this case will require consideration of 8 U.S.C. 1329, which was not expressly included in the question presented in our petition. We did not identify that jurisdictional provision in the question presented because neither the district court nor the court of appeals relied on it. Nevertheless, in accordance with respondents' statement of the question presented (see Br. in Opp. (i)), we agree that the question should be clarified to embrace it.[14] Section 1160(e) bars district court review whether the asserted source of jurisdiction is 28 U.S.C. 1331 or 8 U.S.C. 1329; as our petition suggested, the same principles apply to both grants of general jurisdiction. Pet. 25 n.18.[15]

[13] Plaintiffs' Status Report at 3, *Haitian Refugee Center, Inc. et al.* v. *Nelson*, No. 88-1066-CIV-Atkins, (filed June 23, 1989).

[14] Cf. *INS* v. *Abudu*, 485 U.S. 94, 103-104 (1988) (relying on petitioner's reply memorandum clarifying the question presented).

[15] Respondents' quotation of 8 U.S.C. 1329 to suggest that it affords jurisdiction "[n]otwithstanding any other law" (Br. in Opp. 28) is misleading. The *first* sentence of Section 1329, which grants juris-

c. Respondents urge that the question presented lacks continuing importance because litigation over the legalization programs is winding down. In our petition, we described the far-reaching relief ordered in a number of ongoing legalization cases, including extension of the application deadline and judicial creation of new classes of persons eligible for immigration benefits. Pet. 28-29. The ability of courts to fashion those particular forms of relief, like the ones at issue here, depends on the validity of the theory of district court jurisdiction adopted by the courts below. Moreover, if respondents are correct in their assertion (Br. in Opp. 20) that the principles of *Haitian Refugee Center* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*, apply here, this case will have significance for litigation under the immigration laws—and indeed under other statutes as well—long after the legalization programs have been completed. This case thus presents an issue of broad importance that warrants this Court's review.

* * *

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

MAY 1990

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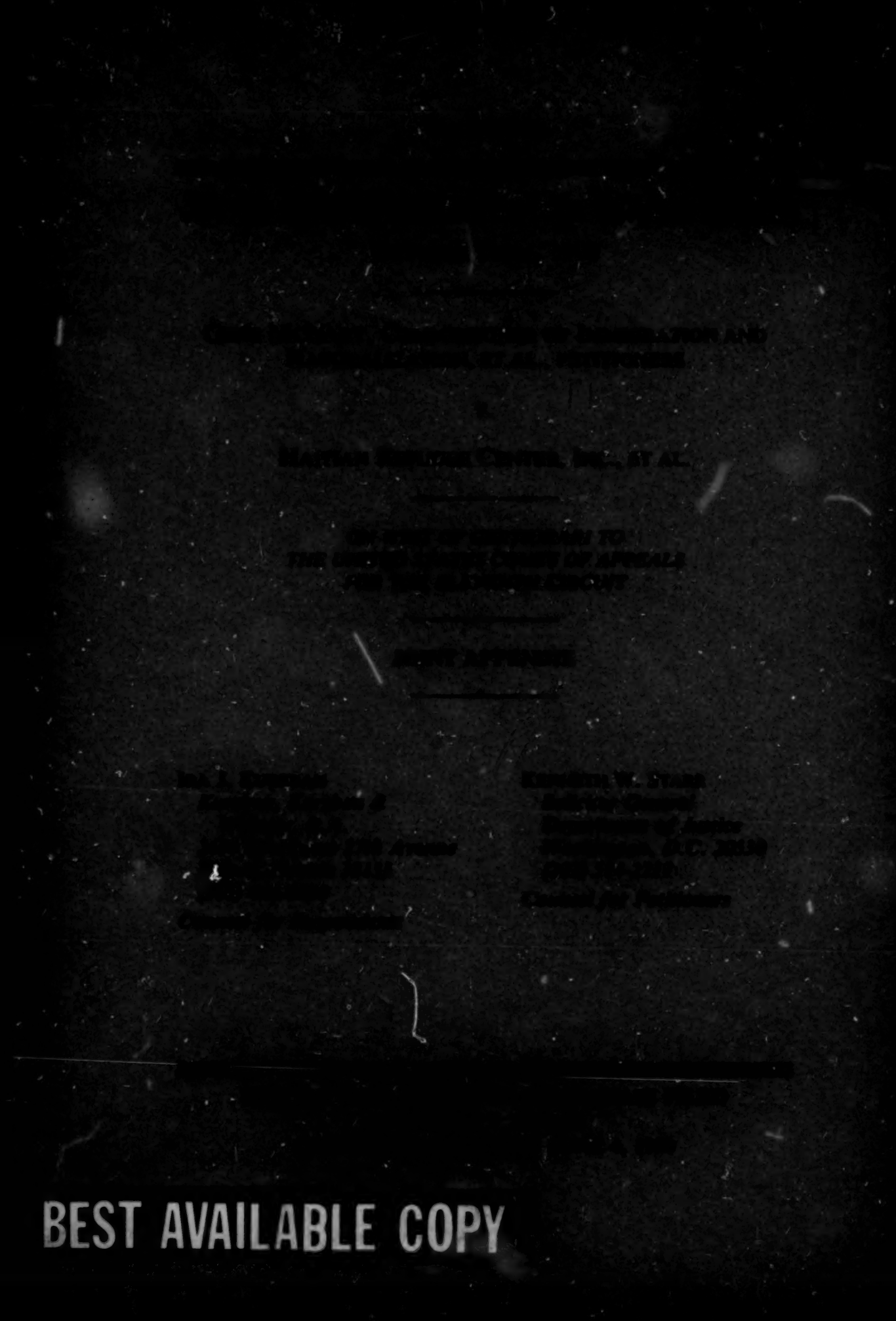
diction to the district courts, does not include the quoted language. It states: "The district courts of the United States have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this SUBCHAPTER ~~title~~." The language quoted by respondents appears in the *third* sentence, which deals only with venue in "prosecutions or suits" brought by the United States.

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00912



BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS*

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* The following materials have been reproduced in the appendix to the petition for a writ of certiorari and are not reproduced in this joint appendix:

Contents – Continued

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-1066-Civ-ATKINS

HAITIAN REFUGEE CENTER, INC., et al.

vs.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, et al.

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1988		
JUN 13	1	COMPLT for declaratory relief, injunctive relief & relief in the Nature of Mandamus w/exhibits (orig.). cf
13	2	MOTION for preliminary injunction, by pltfs. cf
13	–	MEMORANDUM in supp of declaratory relief, injunctive relief & relief in the nature of Mandamus, by plfts. cf
13	4	MOTION for permission to submit memo in excess of pg limitation, by pltfs. cf
14	5	CERTIFICATE of serv, by pltf. cf
16	6	MEMORANDUM in supp of declaratory relief, injunctive relief & relief in the nature of Mandamus, By pltfs. cf

DATE	NR	PROCEEDINGS
16	7	ORDER (SM 6/16/88) GRANTING mot for permission to submit memo in excess of pg limitation, (EOD 6/20/88 CCAP). cf
20	8	NOTICE setting hrg on pltf's mot for preliminary injunction on 7/6/88 @ 8:30 a.m. cf
24	9	MOTION for ext of time for filing brief, by deft Nelson. cf
27	10	ORDER (CCA 6/27/88) GRANTING mot for ext of time for filing deft's Nelson's brief; Deft have by 6/29/88; Pltf has until 7/1/88 w/n which to file any reply, (EOD 6/29/88 CCAP). cf
27	11	ORDER (CCA 6/27/88) REQUIRING proffer of evidence; Pltf is ordered to file proffer by 6/30/88 @ 4:00 p.m.; Deft is ordered to serve resp by 7/5/88 @ 4:00 p.m., (EOD 6/29/88 CCAP). cf
28	12	ORDER (CCA 6/28/88) Pltfs shall file reply by 5:00 p.m. 7/1/88 to defts' resp. (EOD 7/5/88 CCAP). cf
27	13	MOTION for ext of time for filing reply to defts' resp. by pltfs. cf
29	14	OPPOSITION to mot for preliminary injunction, by defts. cf
29	15	MOTION for leave to exceed pg limitation, by defts. cf
29	–	OPPOSITION to mot for preliminary injunction, by defts. (copy) cf
30	16	NOTICE of compliance, by pltfs. cf

DATE	NR	PROCEEDINGS
Jul 1	17	EMERGENCY mot for change of preliminary injunction hrg date, by pltfs. cf
1	18	MOTION for leave to exceed pg limitation, by pltfs. cf
1	–	REPLY memo in supp of mot for a preliminary injunction, by pltfs. cf
1	19	ORDER (CCA 6/30/88) GRANTING mot to exceed pg limitation, (EOD 7/7/88 CCAP). cf
7	20	REPLY memo in supp of mot for a preliminary injunction, by pltfs. cf
1	21	NOTICE of appearance, by counsels for defts. cf
1	–	LETTER to Clerk re: 4 pgs of brief to Ct., by defts. cf
5	22	MOTION to certify the class, by pltfs. cf
5	23	MEMORANDUM in supp of mot to certify the class, by pltfs. cf
5	24	ORDER (CCA 7/5/88) GRANTING pltfs' mot; Clerk shall accept filing of pltfs' reply memo in supp of mot for a preliminary injunction, (EOD 7/7/88 CCAP). cf
1	25	OPPOSITION to mot to certify class, by pltfs. cf
15	26	NOTICE of deps of Marie Gizele Angrand & Marie Raquel Viera on 7/26/88 @ 9:00 a.m., Jeanette Vixama & Germaine Cadet @ 11:00 a.m.; & Hector Trejo Tamayo Vega @ 3:00 p.m.; Novamise Julien & Francklin Joseph @ 9:00 a.m.; Joseph Saintil Dieudone & Rosita Delva

DATE	NR	PROCEEDINGS
		@ 11:00 a.m. & Marie Philomene Servilien & Recol Neus @ 3:00 p.m. on 7/27/88; Gerard Henry, Rose Pierrecina Lebon Pierre @ 9:00 a.m.; Marie France Jean Philippe & Sylvia Lindor @ 11:00 a.m. & Dieumercie Desir @ 3:00 p.m. on 7/28/88. cf
21	27	PROPOSED findings of fact & conclusions Of law, by pltfs. cf
21	28	BRIEF in supp of proposed findings of fact & conclusions of law, by pltfs. cf
22	29	AMENDED notice of deps, by defts (See list for details). cf
22	30	PROPOSED findings of fact & conclusions of law, by defts. cf
22	31	MEMORANDUM in supp of proposed findings of fact & conclusions of law, by defts. cf
25	32	SECOND amended notice of deps, by defts (see list for details). cf
25	33	NOTICE Of filing substituted memo, by pltfs. cf
25	34	BRIEF in supp of proposed findings of fact & conclusions of law, by pltfs. cf
28	35	SUBSTITUTE proposed findings of fact & conclusions of law, by defts. cf
AUG 1	36	SUMMONS iss'd as to defts #1, 3, 4. hr
2	37	NOTICE of clarification in opp to mot class cert & prop findings. hr
2	38	NOTICE of app for pltfs of M.T. Kelleher, FL Rural Legal Svcs, Inc. hr

DATE	NR	PROCEEDINGS
3	39	SUMMONS iss'd Perry Rivkind. hr
4	40	ALIAS summons' iss'd defts #1, 2, 3, 4, 6, 7, 8. hr
5	41	SUMMONS' iss'd Dept. of Justice & Dept. INS. hr
10	42	MOTION to compel, by pltfs. cf
15	43	AFFIDAVIT of service of Michael Guare. cf
15	44	AFFIDAVIT of serv exec 8/10/88 as to Dept of Justice c/o US Attys Asst. Patricia Kenny. cf
22	45	CERTIFIED statement of counsel, by defts. cf
22	46	OPPOSITION to pltfs' mot to compel, by defts. cf
22	47	MOTION to compel, by defts. cf
22	48	MEMORANDUM of points & auth in supp of mot to compel, by defts. cf
22	49	ORDER (CCA 8/22/88) GRANTING pltfs' mot for preliminary injunction & certifying class, (EOD 8/26/88 CCAP). cf
22	50	ORDER (CCA 8/22/88) GRANTING pltfs' mot for preliminary injunction, (EOD 8/26/88 CCAP). cf
25	51	ORDER (CCA) for p/t conf & notice of jury trial; P/T conf on 10/7/88 @ 8:30 a.m.; Trial is scheduled on two wk trial cal beginning 10/17/88: Cal call on 10/13/88 @ 1:45 p.m. cf
Sep 6	52	MOTION for protective order, by pltfs. cf
6	53	RESPONSE to defts' mot to compel, by pltfs. cf

DATE	NR	PROCEEDINGS
7	54	MOTION for stay pending decision to appeal/pending appeal, by defts. cf
8	55	MOTION to compel, by pltfs. cf
19	56	*NOTICE OF APPEAL* from Order entering a preliminary inj on 9/22/88. (Copies to USCA & Attys of Record) (interlocutory). (No fee required). ea
* 16	57	OPPOSITION to defts' mot for stay pending decision to appeal, by pltfs. cf
21	58	EMERGENCY mot to stay proceedings, by defts. cf
23	59	OPPOSITION to defts' emergency mot to stay proceedings, by pltfs w/ exhibs. cf
27	60	OPPOSITION to mot to compel, by defts. cf
28	61	ORDER (CCA 9/27/88) DENYING defts' mot for a stay pending appeal, (EOD 9/29/88 CCAP). cf
28	62	REPLY to pltfs' opp to defts' emergency mot to stay proceedings, by defts; (copy). cf
30	63	NOTICE Of filing original affidavit Of William J. Chambers, by defts. cf
30	64	DECLARATION of William J. Chambers. cf
* 22	—	USCA ack receipt of First Notice of appeal, (88-5934). cf
Oct 3	65	REPLY to pltfs' opp to defts' emergency mot to stay proceedings, by defts. cf

DATE	NR	PROCEEDINGS
5	66	ORDER (CCA 10/5/88) GRANTING defts' mot to stay proceedings to the extent that action has been removed from trial cal & cont until time to be determined by Ct., & DENYING defts' mot to compel discovery & GRANTING pltfs' mot to compel discovery, (EOD 10/7/88 CCAP). cf
6	67	ORDER (USCA) GRANTING Deft's M/stay pending appeal. Paragraphs 6, 7 & 8 of USDC's preliminary inj of 8/22/88 are stayed pending further order of this court. (EOD 10/7/88-CCAP). dd
11	—	*DESIGNATED RECORD ON APPEAL* transm to USCA, (2) vol pldgs, (1) vol exh, (88-5934). dd
11	68	*ANSWER* to complt, by defts. cf
19	69	TRANSCRIPT of testimony of Michael Seward proceedings on 7/7/88 pgs 1-25. li
19	70	TRANSCRIPT of excerpt of proceedings on 7/7/88 pgs 2-8. li
19	71	TRANSCRIPT of excerpt of proceedings on 7/8/88 pgs 9-50. li
19	72	TRANSCRIPT of excerpt of proceedings on 7/11/88 pgs 1-152. li
18	73	PROPOSED PROTECTIVE ORDER (CCA 10/17/88) (EOD 10/19/88 CCAP), (See order for further details). cf

DATE	NR	PROCEEDINGS
21	–	*1st SUPPLEMENTAL ROA* transm to USCA, (4) vol transc, (88-5934). ddg
27	74	TRANSCRIPT of hrg dated 7/6/88. Pgs. 1-84. vp
27	75	TRANSCRIPT of hrg dated 7/7/88. Pgs. 1-188. vp
27	76	TRANSCRIPT of hrg dated 7/8/88. Pgs. 1-57. vp
27	77	TRANSCRIPT of hrg dated 7/8/88. Pgs. 1-115. vp
27	78	TRANSCRIPT of hrg dated 7/11/88. Pgs. 1-54. vp
27	–	*SECOND SUPPLEMENTAL ROA* transm to USCA consisting of 5 vol. transc. (88-5934). vp
28	–	USCA ack receipt of ROA consisting of 2 vols pldgs & 1 vol exhibits, (88-5934). cf
Nov 4	–	USCA ack receipt of Supp certified ROA consisting of 4 vols transcripts, (88-5896). cf
7	–	USCA ack receipt of 2nd supp ROA, (88-5934). cf
15	79	MOTION for stay pending petn for writ of Mandamus, by defts. cf
15	80	MEMORANDUM of points & auth in supp of mot for stay pending petn for writ of mandamus, by defts. cf
22	81	ORDER (CCA 11/22/88) DENYING defts' mot to stay, (EOD 11/25/88 CCAP). cf

DATE	NR	PROCEEDINGS
Dec. 6	–	*EXHIBITS* transm. to USCA, consisting of 1 acc. folder. (88-5934). njf
15	–	USCA ack receipt of ROA consisting of 1 acc folder of exhibits only, (88-5934). cf
1989		
May 12	82	MANDATE (USCA 5/3/89) DENYING petn for writ of mandamus, (EOD 5/17/89) (88-6135). cf
Jun 14	83	ORDER (CCA 6/13/89) that pltfs file status report w/n 10 days, (EOD 6/15/89 CCAP). cf
23	84	STATUS report, by pltfs. cf
Jul 11	85	VERIFIED bill of costs, by Ira J. Kurzban. cf
11	86	AFFIDAVIT of Ira J. Kurzban. 1985 & 86 same binder. cf
11	87	APPLICATION for costs, fees & other expenses under Equal Access to Justice Act & memo in supp, by pltfs. cf
24	88	NOTICE of filing aff of expert, by pltfs. cf
24	89	AFFIDAVIT of Bruce Rogow. cf
28	90	MOTION to stay consideration of pltfs' application for costs, fees & other expenses under Equal Access to Justice Act, by defts. cf
Aug 3	91	RESPONSE to defts' mot to stay consid of pltfs' appl for costs, fees & other expensed under Equal Access to Justice Act., by pltfs. cf

DATE	NR	PROCEEDINGS
11	92	REPLY memo in supp of defts' mot to stay consid of pltfs' applic for costs, fees & other expenses under Equal Acces to Justice Act, by pltfs. cf
16	93	NOTICE of filing re slip opinion Ayuda Inc. v. Thornburgh, by defts. cf
Sept. 6	94	ORDER (CCA 9/6/89) REFERRING cause to US Mag William C. Turnoff ofr R&R on defts' mot to stay consid of pltfs' appl for costs, fees & other expenses, (EOD 9/14/89 CCAP). cf
Oct 18	95	ORDER (WCT 10/16/89) DENYING defts' mot to stay consid of pltfs' appl for costs, fees & other expenses under the Equal Access to Justice Act., (EOD 10/19/89 CCAP). cf
Nov 13	96	MANDATE OF USCA (11/7/89) AFFIRMING jdmt of Dist Ct. & defts/appellants pay pltfs/appellees costs an appeal, (EOD 11/16/89 CCAP) (88-5934) ROA ret'd consisting of 2 accordian of exh & 2 vols ROA, 4 vols supp ROA & 5 vols 2nd supp ROA. cf
15	97	MOTION for ext of time, by defts. cf
20	98	MOTION to exceed page limitation, by defts. cf
20	--	MEMORANDUM of points & auth in opp to pltfs' appl for costs, fees, & expenses under Equal Access to Justice Act, by defts. cf
22	99	ORDER (WCT 11/18/89) GRANTING defts' mot for ext of time, (EOD 11/27/89 CCAP). cf

DATE	NR	PROCEEDINGS
24	100	ORDER (CCA 11/24/89) GRANTING mot to exceed page limitation, (EOD 11/28/89 CCAP). cf
30	101	MOTION for ext of time, by pltfs. cf
* 24	102	MEMORANDUM of points & auth in opp to pltfs' appl for costs, fees, & expenses under Equal Access to Justice Act, by deft. cf
Dec 7	103	ORDER (CCA 12/7/89) REFERRING to US Mag William C. Turnoff for R&R on pltfs' appl for costs, fees & expenses, (EOD 12/12/89 CCAP). cf
11	104	ORDER (WCT 12/8/89) GRANTING mot for ext of time; Pltfs shall have to 12/18/89 in which to file their resp, (EOD 12/14/89 CCAP). cf
18	105	MOTION for ext of time to file reply, by pltfs. cf
26	106	MOTION for ext of time to file reply, by pltfs. cf
28	107	ORDER (WCT 12/27/89) GRANTING pltf's mot for ext of time; Pltfs' have to 12/29/89 to file reply, (EOD 12/29/89 CCAP). cf
1990		
Jan 4	108	MOTION to file memo in excess of 20 pages, by pltfs. cf
9	109	REPLY to defts' memo of points & authorities in opp to pltfs' appl for costs, fees, & expenses under Equal Access to Justice Act, by pltfs. cf

DATE	NR	PROCEEDINGS
25	110	SUPPLEMENT to defts' memo of points & auth in opp to pltfs' appl for costs, fees & expenses under the Equal Access to Justice Act, by defts. cf
31	111	ORDER (WCT 1/30/90) GRANTING pltfs' mot to file memo in excess of 20 pgs., (EOD 2/1/90 CCAP). cf
Feb 29	112	ORDER (WCT–2/28/90) pltfs file resp to defts' suppl to defts' memo in opp to pltfs' application for costs by 3/19/90 (EOD–3/7/90–CCAP). vf
Mar 9	113	RESPONSE purs court ord of 2/28/90, by pltfs. vf
22	114	REPLY to resp purs to Court Order of 2/28/90, by defts. dm
May 2	115	R&R (WCT 4/30/90) recomm that Pltfs' applic for costs & fees under the EAJA be HELD IN ABEY-ANCE pending disposition of defts' petn for Writ of Certiorari in the US Supreme Court. Ptys file obj w/in 10 days. (EOD 5/3/90–CCAP). dm
Jun 18	116	SUPPLEMENT to resp purs to Court Order of 2/28/90, by Pltfs. dm
20	117	ORDER (CCA 6/19/90) ADOPTING R&R of Mag & Pltfs' applic for costs & fees be HELD in ABEYANCE pending disposition of Defts' petn for Writ of Certiorari in US Supreme Court. (EOD 6/25/90–CCAP). dm

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 88-5934

HAITIAN REFUGEE CENTER, INC., et al.

v.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, et al.

DOCKET ENTRIES

TITLE. HAITIAN REFUGEE v. NELSON

NO 88-5934

EXPEDITED

1. RECORD, EXHIBITS AND BRIEF INFORMATION

Filed		Due
09-29-88	Appeal Information Sheet	
	Court Reporter Acknowledgment	10-09-88
	Transcript	
	Record on Appeal	
	Partial Record or Cert List	
10-20-88	Record on Appeal - No of Vols 2	
10-26-88	Supp Record - No of Vols 4T	
11-01-88	Second Supp Record - No of Vols 5T	
10-20-38	Exhibits 1X ☐ Env ☐ Box ☐ Pkg ☐ Roll	
12/9/88	Exhibits 1 ☐ GC ☐ Box ☐ Pkg ☐ Roll	
	Briefing Notice Issd	10-7-88
10-17-88	Brief for Appellant CEd PT	10-17-88
	Brief for Appellant M10-20	
10-17-88	Rec'd Excerpts CEd	10-17-88
11/10/88	Brief for Appellee d10/9 CE'd	
	Brief for Appellee	11-09-88
	Brief for Cr Appellee	
11/22/88	Reply Brief for Appellant 11/18 (CE'd)	11-17-88
	Supp Brief for Appellant	
	Supp Brief for Appellee	
11/17/88	Brief for Amicus (CE'd)	
	Intervenor	
	Supp Authority	
	Supp Authority	

2. AGENCY REVIEW CASES

- Petition for Review of Order of ☐ NLRB ☐ FPC ☐
- Application for Enforcement — NLRB
- Answer to Application for Enforcement
- Cross Application for Enforcement
- Summary Entry of Judgment
- Appl for Entry of Supp Judgment

3. MISCELLANEOUS FILINGS

09-22-88 Dup Notice of Appeal and D C Docket Entries

- Papers Trans from Misc No
- Order of DC Granting Appeal IFP
- Order of DC Appointing Counsel
- Affidavit of Financial Status
- CJA 20 Issd Voucher Recd
- CJA 21 for Transcript

09-30-88 Sent to Juris. Screening.

4. EXTENSION Flg. Motion for:

	Order Fld.	Ext. to:
Appeal Information Sheet		
Record Trans		
Record Trans		
Appellant's Brief		
Appellant's Brief		
Appellant's Brief		
Appellee's Brief		
Appellee's Brief		
Appellee's Brief		
Reply Brief		

5. CALENDAR INFORMATION

Non Argument Panel

11/21/88 Case Assigned for 12/14/88 Atl ☐ Mont ☐ Cas ☐ Mia ☐

Case Cont'd for Reassignment

Case Reassigned for ☐ Atl ☐ Mont ☐ ☐ Mia ☐

Hearing Panel PHR/RSV/KAUFMAN

12/14/88 Case Argued XX by Appellant XX by Appellee

Case Sub w/o Arg ☐ by Appellant ☐ by Appellee

Arguing Judge

6. OPINION INFORMATION XXX Pub NonPub

5/23/89 Opinion Rendered

RSV Affirmed

Reversed

Affd in Pt P C Conc Spec

Vacated XXX Signed Dis

Dismissed Rule 36-1 Dis in Pt

Opinion Withdrawn

7. REHEARING INFORMATION

05-31-89 Mot for Ext Ext to 7-12-89 NFE (DJM)

Mot for Ext Ext to

ES Mot for Ext Ext to

07-12-89 Petition for Rehearing (j)

☒ Appellant ☐ Appellee ☐ Reg ☒ Time

Petition for Rehearing

☐ Appellant ☐ Appellee ☐ Reg ☐ Time

ES Response of

10-10-89 Order Denying Rehearing

Dissenting

☐ Opinion §9

☐ Order on Petition for Rehearing §9

14

NO. 88-5934

8. MOTIONS

Date	Filing Motion to or for:	Response Filed By	Date	Granted	Denied	By Court / Clerk	Date
	Mandamus						
	Reinstate Appeal						
	Stay Further Proceedings in CA			XX		SeeS9	10-05-88
09-23-88	Stay Pending Appeal Aplt						
	Injunction Pending Appeal						
	Consolidate Appeals W. No						
	Leave to Appeal IFP						
	Bail Pending Appeal						
	Withdraw as Counsel						
	Appointment of Counsel						
	Leave to File Supp. Record						
	Leave to File Brief in Excess Pgs						
	Dismiss by Appellant						
	Dismiss by Appellee						
	Amicus Curiae						
	Leave to File Supp. Brief	Aples'	10-30-89				
10-17-89	Stay of Mandate See S-9						
	Recall Mandate						
	Expedite Appeal						
	Remand						
	Limited Remand						

9. OTHER DOCKET ENTRIES

10-05-88	Flg. Order: aplt's motion for stay pending appeal is GRANTED. Para. (6), (7), and (8) of the DC's preliminary injunction of Aug. 22, 1988, are stayed pending further order of this Court. This appeal is expedited. (PLT/JLE/ERC) ag
11/10/88	Flg. motion of American Immigration Lawyers Association for leave to file an amicus brief.(Sub. PHR 11/15/88)jwp
11/17/88	Flg. order GRANTING motion of American Immigration Lawyers Association for leave to file an amicus brief.(PHR) jwp
07-25-89	Flg. Mot. of aplts. for leave to file supplemental authority./rgw
07-26-89	Flg. Order - Aplt's Mot. for leave to file supplemental authority is GRANTED. RSV./rgw
10-17-89	Flg. Aplts' Mot. to stay mandate and to continue preliminary injunction.
11-02-89	Flg. Order - Aplts' Mot. to stay mandate for 30 days and to continue the 10-05-88 stay of paragraphs (6)(7) and (8) of the DC's 8-22-88 preliminary injunction order pdg application to the Supreme Court for a writ of certiorari is DENIED. RSV./rgw

10. JUDGMENT OR MANDATE INFORMATION

	Bill of Costs
	Obj. to Bill of Costs
5/23/89	Flg. & Entg. Judgment
	Issg. Copy of Jdgt. to Bd & Cnsl
11-07-89	Jdgt. as Mdt. Issd. to Clerk
	Jdgt. as Mdt. Reissd. to Clerk
11-07-89	Dismissal Issd. to Clerk
11-07-89	Record on Appeal Retd. to Clerk
	Exhibits Retd. to Clerk

total 11 volumes
2 acc. folders

Mandate Stayed to

11. SUPREME COURT INFORMATION No. 89-1332

	Precip. [illegible] Proceed. [illegible] Certiorari
	[illegible]
	Transmitting Orig. Exhibits to S.C.
	Order of S.C. — Ext. to
2/26/90	Notice of Flg. of Cert. Pet. on
	Order of S.C. ☐ Denied ☐ Granted
	Notice of Denial of Pet. for Rehearing
	Opinion of S.C. dated
	Judgment of S.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 88-1066-Civ-ATKINS

HAITIAN REFUGEE CENTER, INC., et al.

vs.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, et al.

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF AND RELIEF IN THE NATURE OF MANDAMUS

(Class Action)

The Plaintiffs, HAITIAN REFUGEE CENTER, INC., et al., sue the Defendants, PERRY RIVKIND, et al., and allege as follows:

I. PRELIMINARY STATEMENT

1. This is a class action seeking declaratory, mandatory and injunctive relief for Plaintiffs and a class of persons who have applied for, or will in the future apply for, Temporary Lawful Residence status as Special

Agricultural Workers ("SAW") under Section 210 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* as amended by the Immigration Reform and Control Act ("IRCA"), Pub. L. 99-603, 100 Stat. 3359 (November 6, 1986), and who have been or will be denied such status by the Immigration and Naturalization Service ("INS") because of the Defendants' unlawful practices.

This action challenges the practices, policies and procedures of the INS for determining Lawful Temporary Resident status under the SAW program. The Plaintiffs have been deprived of their rights under IRCA in the application of an improper burden of proof to be applied in determining SAW applications, in the procedure for interviewing SAW applicants and determining their applications, and in the procedure for appealing denials of their claims. This suit also challenges the failure of the INS to promulgate regulations to insure that the applicants are able to secure employment records to establish their claims, when such evidence exists.

2. Under the SAW provisions of IRCA, the Attorney General *must* grant temporary lawful resident status to any alien who applies for such status within the statutorily set time period, is admissible to the United States as an immigrant, and can establish that s/he:

a) resided in the United States; and

b) performed at least 90 man-days of seasonal agricultural services in the United States during the twelve month period ending on May 1, 1986.

8 U.S.C. § 1160(a)(1).

3. Under IRCA, the SAW applicant has the initial burden of proving by a preponderance of the evidence that s/he has worked the required 90 man-days of farm labor.

8 U.S.C. § 1160(b)(3)(B)(i). A SAW applicant "can meet such burden of proof . . . by providing sufficient evidence of that employment as a matter of just and reasonable inference. In such a case, the burden then shifts to the Attorney General to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be drawn from the evidence." 8 U.S.C. § 1160(b)(3)(B)(iii). No specific kind of proof is required of SAW applicants and Congress, recognizing that standard employment records often do not exist or would be extremely difficult for many farmworkers to obtain, made applicable to SAW applications the lenient standards of proof developed in the Fair Labor Standards Act ("FLSA") caselaw, which provides that uncorroborated testimony alone creates a just and reasonable inference and shifts the burden of disproving that inference to the other party. *See* H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. No. 97, *reprinted in* 1986 U.S. CODE CONG., & ADMIN. NEWS 5840, 5853. Similarly, Defendants' own regulations provide that proof other than standard employer records, including affidavits from crewleaders and co-workers, may be submitted. 8 C.F.R. § 210.3(c)(3).

4. The most serious of Defendants' violations of the law complained of in this case is that, despite the clear language of IRCA, the clear intent of Congress, and the provisions of their own regulations, Defendants have imposed an impossible burden of proof on SAW applicants and are requiring applications to be substantiated with payroll records, pay stubs or other nonexistent documentary evidence.

5. In order to insure that a SAW applicant is able to remain in the United States at least long enough for the

decision on his/her application to be made, IRCA provides that any alien who submits a "nonfrivolous" application for temporary lawful resident status has the right to work authorization and a stay of deportation or exclusion until the final determination on the application has been made. 8 U.S.C. § 1160(d)(2). Defendants' regulations also provide that applicants who submit "nonfrivolous" applications shall be allowed to travel abroad. 8 C.F.R. § 210.4(b)(2). Congress defined a "nonfrivolous" application as one in which the applicant: (1) attests that s/he has worked the requisite number of man-days; (2) identifies the type or nature of the proof s/he intends to produce to prove his/her claim; (3) acknowledges the penalties for fraud; and (4) identifies his/her current or immediate past employer. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 97, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5842. Congress also made clear their "inten[t] that INS not go beyond these criteria in seeking to determine whether an alien has made a "nonfrivolous" case for eligibility [because doing so] may undermine the purposes of this section, ie., to encourage undocumented workers to come forward and seek to obtain legal status." *Id.*

6. Every SAW applicant must submit an application to an INS Legalization Office (LO) within the statutorily-prescribed period, must submit some evidence supporting his/her claim, and must report for a personal interview in front of an INS examining officer at the LO. 8 U.S.C. § 1160(1)(A) & (B), 8 C.F.R. § 210.2.

7. This personal interview is an inquisitorial fact-finding procedure, wherein the applicant is asked questions about any subject deemed relevant by the examining officer. The applicant is not, however, afforded the op-

portunity to present witnesses, to cross-examine those who provide evidence against the worker, to challenge the propriety or veracity of any evidence the examining officer has against him/her or even to be apprised if such evidence exists or if the officer perceives any discrepancy or problem in the applicant's case. The applicant is also frequently faced with having to rely on incompetent and unprofessional translators during the interview process.

8. It is at the LO interview stage that Defendants are supposed to separate "frivolous" from "nonfrivolous" applications. Applications which fall in the former category can be denied on-the-spot at the LO, and these applicants are not given work authorization, cannot travel abroad, and are immediately rendered subject to deportation. In deciding which applicants to deny at the LO, Defendants have far exceeded the limitations imposed on them by Congress and, until recently, the provisions of one of their own regulations. Until March 29, 1988, Defendants' regulations provided that SAW applications could be denied at LO's only in cases of clear ineligibility or admitted fraud. 8 C.F.R. § 103.1(n)(2), *amended at* 53 Fed. Reg. 10,064 (1988) (to be codified at 8 C.F.R. § 103.1) (proposed Mar. 29, 1988). Yet while this rule was in effect, Defendants regularly and consistently denied "nonfrivolous" applications at the LO if fraud was merely suspected and/or if the application was not supported by work records and erroneously failed to issue stays of deportation or work authorization to applicants denied in this manner, pending final adjudication of their claim.

9. SAW applications which are *not* denied at the LO are referred by the LO to one of four Regional Processing Facilities (RPF's) for review. In forwarding the application to the RPF, the LO examining officer includes a recommendation that the application either be approved or denied. In making this recommendation, the examining officer frequently assesses the level of suspected fraud in the application (level one being the lowest and level five being the highest). Regardless of the recommendation, the applicant may not be deported or excluded and must be issued an I-688A, an INS document which temporarily authorizes him/her to work in the United States and to travel abroad, pending final adjudication of the claim. 8 U.S.C. § 1160(d)(2), 8 C.F.R. § 210.4(b)(2). Recommendations from the LO are often ignored by the RPF, and several of the applications filed by Plaintiffs in this case was denied by the RPF after being *recommended* for *approval* at the LO.

10. If the RPF approves a SAW application, the applicant is granted lawful temporary resident status, and is issued form I-688, proof of this status. 8 U.S.C. § 1160(a), 8 C.F.R. § 210.4. The I-688 is valid until the applicant becomes a lawful permanent resident of the United States, which in most cases will occur two years after issuance of the I-688. 8 U.S.C. § 1160(a), 8 C.F.R. § 210.5.

11. If the RPF denies a SAW application, the applicant is sent a notice indicating that the application has been denied. For the first several months of the SAW program, Defendants' notices of denial provided virtually no information to the applicant regarding the basis for denial, even though Defendants' regulations provide that SAW applicants whose applications are denied are to be given "written notice setting forth the specific reasons for the denial". 8 C.F.R. § 103.3(a)(2). Additionally, these notices gave applicants only fifteen days to appeal instead

of the thirty days required by 8 C.F.R. § 103.3(a)(2)(i), and did not inform the applicant where to send the appeal. The notices of denial issued by Defendants in recent months are somewhat more informative, and the sufficiency of only the earlier denials are at issue in this case because the Defendants have refused to voluntarily rescind them.

12. A SAW applicant whose application is denied has thirty days to file an administrative appeal to the Legalization Appeals Unit (LAU), whose decision constitutes Defendants' final decision in a SAW case. 8 U.S.C. § 1160(e), 8 C.F.R. 103.3.

13. At the point when Defendants render their final administrative decision in a SAW application, either at the LAU or an unappealed RPF decision, the applicant no longer has work authorization or the ability to travel abroad, and is subject to deportation. Thus, those Plaintiffs and members of the class they seek to represent who were not denied at the LO have received only a temporary reprieve, and sooner or later will lose their work authorization, ability to travel abroad, and will become subject to deportation.

14. The Defendants have devised several procedures and are engaging in numerous practices which deprive Plaintiffs of their rights under IRCA, without due process of law and in violation of the statute. Plaintiffs in this case seek vindication of their Constitutional and statutory rights.

II. JURISDICTION

15. Jurisdiction is conferred pursuant to 28 U.S.C. §§ 1331, 2201-2202 and 8 U.S.C. § 1329.

16. Venue is proper in this Court as the Plaintiffs reside in this judicial district and Defendants have engaged in the challenged practices and policies in this judicial district.

III. PARTIES

17. Plaintiff, HAITIAN REFUGEE CENTER, INC. ("HRC") is a non-profit membership corporation organized under the laws of Florida, with its principal place of business in Miami, Florida. Among HRC's membership are Haitian refugees, many of whom reside in this country with the permission of INS but who do not possess a formal immigration status. HRC provides legal representation to Haitian refugees who are seeking asylum or other legal status in the United States, including Haitians who are seeking benefits under IRCA's SAW Program. Many of HRC's members performed ninety (90) man-days of seasonal agricultural work in the United States between May 1, 1985-May 1, 1986, and provided sufficient evidence to substantiate their claims. Defendants' refusal to recognize that such persons are eligible under IRCA both directly and indirectly injures HRC. It directly injures the organization because it makes HRC's work of assisting the Haitian refugee community more difficult and results in the diversion of HRC's limited resources away from members and clients having other urgent problems. It indirectly injures the organization because it adversely affects those members of the HRC whose applications for Legalization status have been erroneously denied. HRC brings this action to redress its own direct injury and as a representative of its members who have been or will be denied Tempo-

rary Resident status, stays of deportation and work authorization as a result of the policies and practices challenged herein.

18. Plaintiff MIGRATION AND REFUGEE SERVICES OF THE ROMAN CATHOLIC DIOCESE OF PALM BEACH ("RCDPB") is a component of the Roman Catholic Diocese of Palm Beach. Its principle [*sic*] place of business is West Palm Beach, Florida. Many members of parishes within the diocese of Palm Beach are foreign agricultural workers who worked at least 90 man-days in the 1985 and 1986 season, and are therefore potentially eligible for the SAW program. In addition, Plaintiff MIGRATION AND REFUGEE SERVICES OF THE RCDPB has been designated by Defendant INS as a "Qualified Designated Entity" (QDE) under IRCA. QDE's are authorized to provide counseling to aliens about the legalization program, to assist them in filling out applications and obtain documentation, and receive applications for adjustment to temporary resident status. Under IRCA, applications filed with a QDE are deemed to have been filed as of the same date with INS, to whom the QDE's forward the applications for processing. QDF's are authorized to receive fees from applicants and reimbursement from INS for counseling and filing services. The actions of Defendants complained of in this case discourages otherwise eligible SAW applicants from seeking counseling and filing of their applications by Plaintiffs MIGRATION AND REFUGEE SERVICES OF THE RCDPB and prevents them from fulfilling its basic mission of assisting aliens to qualify under IRCA.

19. Plaintiff MARIE GIZELE ANGRAND is a native and citizen of Haiti who entered the United States in July, 1983. She began performing seasonal agricultural work shortly thereafter and continues to earn her livelihood in this manner. On February 4, 1988 she submitted her SAW

application, along with supporting documentation, and was interviewed by agents of the Defendants. Her crew-leader during the period-in-question accompanied her to the interview, although Defendants' agents did not ask to speak to him. Upon termination of the interview, and after the INS examining officer had assessed her documentation as well as her credibility, the LO officially *recommended* to the RPF that Plaintiff ANGRAND's application be *approved* although the RPF subsequently issued her a formal denial. ANGRAND's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate her SAW claim.

20. Plaintiff GERMAINE CADET is a fifty-eight year old native and citizen of Haiti who entered the U.S. on November 14, 1985. She began performing seasonal agricultural work shortly thereafter and continues to earn her livelihood in this manner. On June 9, 1987, Plaintiff CADET submitted her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. CADET's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate her SAW claim.

21. Plaintiff ROSITA DELVA is a native and citizen of Haiti who entered the U.S. on January 10, 1985, and began performing seasonal agricultural work shortly thereafter. On January 6, 1988, she filed her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. Plaintiff DELVA's interview was translated by another SAW applicant who did not speak fluent English but happened to be in the hallway of the LO where she applied. Plaintiff DELVA's

application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of improper burden of proof, the improper denial of her application at the LO, and the deficiency of the process employed to adjudicate her SAW claim.

22. Plaintiff DIEUMERCIE DESIR is a native and citizen of Haiti who entered the U.S. on October 15, 1985. She began performing seasonal agricultural work shortly thereafter and did so regularly until her pregnancy a few months ago. On June 29, 1987 she filed her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. Upon termination of her interview, and after the examining officer had assessed Plaintiff DESIR's documentation as well as her credibility, the LO officially *recommended* to the RPF that her application be *approved* although the RPF subsequently issued her a formal denial. DESIR's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate her SAW claim.

23. Plaintiff GERARD HENRY is a native and citizen of Haiti who entered the U.S. on May 19, 1984. He began performing seasonal agricultural work shortly thereafter and continues to earn his livelihood in this manner on a part-time basis. On November 19, 1987, he filed his SAW application, along with supporting documents, and was interviewed by agents of the Defendants. Plaintiff HENRY's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof, the improper denial of his application at the LO, and the deficiency of the process employed to adjudicate his SAW claim.

24. Plaintiff MARIE FRANCE JEAN-PHILIPPE is a native and citizen of Haiti who entered the U.S. on April 15, 1985. She began performing seasonal agricultural work shortly thereafter and continues to earn her livelihood in this manner. On November 19, 1987, she filed her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. Plaintiff JEAN-PHILLIPPE's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof, the improper denial of her application at the LO, and the deficiency of the process employed to adjudicate her SAW claim.

25. Plaintiff FRANCKLIN JOSEPH is a native and citizen of Haiti who entered the U.S. on January 29, 1985. He began performing seasonal agricultural work shortly thereafter and did so until June, 1987. On June 30, 1987 he filed his SAW application, along with supporting documents, and was interviewed by agents of the Defendants. Upon termination of the interview, and after the INS examining officer had assessed Plaintiff JOSEPH's documentation as well as his credibility, the LO officially *recommended* to the RPF that his application be *approved* although subsequently he was issued a formal denial from the RPF. Plaintiff JOSEPH's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate his SAW claim.

26. Plaintiff NOVAMISE JULIEN is a native and citizen of Haiti who entered the U.S. in December, 1983. She began performing seasonal agricultural work shortly thereafter and continues to earn her livelihood in this manner on a part-time basis. On June 24, 1987, she filed her SAW application, along with supporting documents, and

was interviewed by agents of the Defendants. She was subsequently issued a formal denial of her application from the RPF. Plaintiff JULIEN appealed that decision and has since received a final notice of ineligibility from the LAU. Plaintiff JULIEN's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate her SAW claim.

27. Plaintiff SYLVIA LINDOR is a native and citizen of Haiti who arrived in the U.S. in 1984. She began performing seasonal agricultural work in 1985 and did so regularly until October, 1986. On August 5, 1987 she filed her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. She was subsequently issued a formal denial of her application from the RPF. Plaintiff LINDOR's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate her SAW claim.

28. Plaintiff RECOL NEUS is a native and citizen of Haiti who arrived in the U.S. on September 6, 1984. He began performing seasonal agricultural work shortly thereafter and did so fairly regularly until January, 1987. On June 9, 1987 he filed his SAW application, along with supporting documents, and was interviewed by agents of the Defendants. Upon termination of his interview, and after the examining officer had assessed Plaintiff NEUS' documentation as well as his credibility, the LO officially *recommended* to the RPF that his application be *approved* although the RPF subsequently issued him a formal denial. NEUS' application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate his SAW claim.

29. Plaintiff ROSE PIERRECINA LEBON PIERRE is a native and citizen of Haiti who arrived in the U.S. in June, 1985 and began performing seasonal agricultural work shortly thereafter. On June 24, 1987 she filed her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. Plaintiff PIERRE's crewleader personally accompanied her to the interview because his work records and various other possessions had been stolen and he had written Defendants asking them not to accept any SAW applications which showed him as employer unless he personally accompanied the applicant to the interview. PIERRE's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate his SAW claim.

30. Plaintiff MARIE PHILOMENE SERVILIEN is a native and citizen of Haiti who entered the United States on September 9, 1985, and began performing seasonal agricultural work shortly thereafter. On June 23, 1987, she filed her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. She was subsequently issued a formal denial of her application from the RPF. Plaintiff SERVILIEN appealed that decision and has since received a final notice of ineligibility from the LAU. SERVILIEN's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate her SAW claim.

31. Plaintiff HECTOR TREJO TAMAYO is a native and citizen of Mexico who began performing seasonal

agricultural work in 1984 and continues to earn his livelihood in this manner. On June 12, 1987 he filed his SAW application, along with supporting documents, and was interviewed by agents of the Defendants. His employer accompanied him to his interview and was with him during the entire period. About the same time that Plaintiff TREJO received his denial from the RPF, three other SAW applicants who worked for the same employer that he did, and who had submitted their application to Defendants on the same day that he had, received formal approvals on their applications. Plaintiff TREJO's employer cannot understand why this happened since she submitted almost identical documentation for those workers of hers who were approved and those who were denied. TREJO's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate her SAW claim.

32. Plaintiff JUAN TAMAYO VEGA is a native and citizen of Mexico who began performing seasonal agricultural work in early 1980 and continues to earn his livelihood in this manner. On June 12, 1987 he filed his SAW application, along with supporting documents, and was interviewed by agents of the Defendants. His employer accompanied him to his interview and was with him during the entire process. About the same time that Plaintiff TAMAYO received his denial from the RPF, three other SAW applicants who worked for the same employer he did, and who had submitted their applications to Defendants on the same day that he had, received formal approvals on their applications. Plaintiff TAMAYO's employer cannot understand why this happened since she submitted almost identical documentation for those workers of hers who were approved and those who were denied. TA-

MAYO's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate his SAW claim.

33. Plaintiff MARIE RAQUEL VIERA is a native and citizen of Mexico who entered the U.S. on November 10, 1982. She began performing seasonal agricultural work shortly thereafter and continues to earn her livelihood in this manner. On July 2, 1987 she filed her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. VIERA's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof and the deficiency of the process employed to adjudicate her SAW claim.

34. Plaintiff JEANETTE VIXAMA is a native and citizen of Haiti who entered the United States on February 18, 1982, and began performing seasonal agricultural work in 1984. On August 26, 1987, she filed her SAW application, along with supporting documents, and was interviewed by agents of the Defendants. Plaintiff VIXAMA's application for SAW status was denied as a result of the practices and policies challenged herein, including, but not limited to, the application of an improper burden of proof, the lack of specificity of the Notice of Denial, and the deficiency of the process employed to adjudicate her SAW claim.

35. All of the above-named Plaintiffs performed at least ninety (90) man-days of seasonal agricultural work between May 1, 1985 and May 1, 1986 and were employed by crewleaders licensed by the U.S. Department of Labor, pursuant to the Migrant and Seasonal Agricultural Protection Act ("AWPA"). All were paid in cash for their work

on the farms and never were issued a receipt. In support of their SAW applications, all submitted form I-700 (SAW application form), I-705 (affidavit confirming seasonal agricultural employment), and additional employer affidavits. During their interviews, Plaintiffs answered each of the questions posed by Defendants' agents truthfully and, except as described above, were not given any indication that their answers were incomplete or incorrect. Despite having complied with the requirements set forth by IRCA, Plaintiffs had their applications denied by Defendants on the basis of their unlawful practices and policies, including, but not limited to, the application of an improper burden of proof, the issuance of deficient notices of denial, the improper denial of applications at the LO, and the deficiency of the process employed to adjudicate SAW claims.

36. The applications filed by Plaintiffs DELVA, HENRY, and JEAN-PHILIPPE were denied at the LO, despite the fact that they contained supporting documents demonstrating that the applicants were prima facie eligible for temporary residency. These denials violated IRCA as well as Defendants' own regulations in effect at the time which allowed for denial at the LO only in cases of admitted fraud or clear statutory ineligibility. As a result of Defendant's unlawful and improper actions, these Plaintiffs and members of the class they seek to represent are without work authorization and stays of deportation, pending final adjudication of their claims, and face possible criminal charges based on Defendant's allegations of fraud. But for the Defendants' unlawful and improper actions, these Plaintiffs would be lawful Temporary Residents of the United States and entitled to all the benefits and privileges accorded that status.

37. Defendant PERRY RIVKIND is District Director of the INS for District VI, which includes the State of

Florida. As the official responsible for the administration of the INS in Southern Florida, he is responsible for the local implementation and enforcement of the INA and the regulation challenged herein. Defendant RIVKIND is being sued in his official capacity.

38. Defendant KENNETH PASQUARELL is District Director of the INS for District 26, which includes the states of Alabama and Georgia. As the official responsible for the administration of the INS in these states, he is responsible for the implementation and enforcement of the INA and the regulations challenged herein. Defendant PASQUARELL is being sued in his official capacity.

39. Defendant IMMIGRATION AND NATURALIZATION SERVICE ("INS") is an agency of the United States Government and is the federal agency within the Department of Justice responsible for the lawful administration and implementation of IRCA's SAW program.

40. Defendant ALAN C. NELSON is the duly appointed Commissioner of the INS, an agency of the Department of Justice. Pursuant to Section 103(b) of the Immigration Act, 3 U.S.C. § 1103(b), he is charged with any and all responsibilities and authority in the administration of the INS. Defendant NELSON is the Justice Department official responsible for implementation of the SAW program and, absent action by this Court, he will continue to implement that program pursuant to the unlawfully restrictive policies and practices challenged herein. Defendant NELSON is being sued in his official capacity.

41. Defendant RICHARD NORTON is the duly appointed Associate Commissioner for Examinations of the INS. In that capacity he has the operational responsibility for the SAW program of the Defendant INS and is directly responsible for the practices and policies challenged herein. Defendant NORTON is being sued in his official capacity.

42. Defendant WILLIAM CHAMBERS is Director of the INS' RPF for the Southern Region, located in Dallas, Texas. In that capacity he has the operational responsibility for the RPF, which renders adjudicative decisions on all SAW applications in the states of Florida, Georgia, and Alabama other than those denied by the District Director, and as such is directly responsible for the practices and policies challenged herein. Defendant CHAMBERS is being sued in his official capacity.

43. Defendant WILLIAM SLATTERY is the duly appointed Assistant Commissioner for Legalization of the INS. In that capacity he has the operational responsibility for the SAW program of the Defendant INS, and is directly responsible for the practices and policies challenged herein. Defendant SLATTERY is being sued in his official capacity.

44. Defendant EDWIN MEESE, III is Attorney General of the United States and in that capacity has final authority over the decisions, practices and procedures challenged herein. 8 U.S.C. § 1103(a). The Attorney General has delegated his authority under the INA to officials of the INS. Defendant MEESE is being sued in his official capacity.

45. Defendant UNITED STATES DEPARTMENT OF JUSTICE is the federal agency to which Defendant INS is responsible.

IV. CLASS ACTION ALLEGATIONS

46. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated within the jurisdiction of the Eleventh Circuit Court of Appeals pursuant to Fed. R. Civ. P. 23(a) and 23(b)(1) and (2). The class, as proposed by Plaintiffs, consists of all persons who have applied for, or will in the future apply for, adjustment to Lawful Residence status under the SAW program within

the eighteen (18) month application period and who have been, or will be, denied such status by the INS within this Circuit because of the Defendants' unlawful policies and practices.

47. Individual suits by each member of the respective class would be impracticable because:

a) the number of suits would impose an undue burden on the courts because thousands of persons have been denied SAW status in this Circuit;

b) many members of the class are unaware of their rights and are intimidated due to their status as aliens; and

c) many members of the class, who may be aware of their rights, are unable to bring individual lawsuits due to the financial expenses involved.

48. Plaintiffs are adequate representatives of their respective class because they have been subjected to or threatened with policies and procedures that are identical with the policies and procedures to which the members of the class have been subjected and with which the members of the class have been threatened and because, like members of their respective class, they seek adjustment of status under Section 210 of IRCA.

49. A community of interest exists between Plaintiffs and members of their class in that there are questions of law and fact which are common to all. They seek a determination of whether the INS practices and policies challenged herein are lawful.

50. Defendants have acted or threatened to act on grounds generally applicable to the class, making appropriate final declaratory and injunctive relief with respect to the class as a whole.

51. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or

varying adjudications with respect to individual members of the class which would establish conflicting standards of conduct for the INS.

52. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

53. No administrative remedies under the INA exist which remain to be exhausted that would not be futile or that would provide the relief sought herein.

54. No independent litigation has, as of the time of filing this suit, been brought by any member of the respective class against Defendants as to the issues raised in this Complaint.

55. Plaintiffs' counsel are experienced in class action litigation and can adequately represent the interests of the class members as well as those of the named Plaintiffs.

V. IRREPARABLE INJURY

56. As a result of Defendants' illegal practices and procedures, Plaintiffs and the members of the class they seek to represent have suffered and will continue to suffer irreparable injury. All have been or will be denied their most basic right under IRCA: the right to obtain lawful temporary resident status, and ultimately, lawful permanent resident status. Moreover, Plaintiffs DELVA, HENRY, and JEAN-PHILIPPE and many members of the class they seek to represent have been denied temporary work authorization, stays of deportation and the right to travel abroad, pending final adjudication of their claims. Similarly, Plaintiffs JULIEN and SERVILIEN have received final decisions in their case and therefore are no longer entitled to work authorization and stays of deportation. All Plaintiffs and members of the class they seek to represent can also be improperly subjected to criminal fraud charges.

[*sic*] breaking point and made it impossible for Plaintiff HRC to fulfill its basic mission of meeting the legal needs of the Haitian Community, but they have prevented Plaintiff HRC from attending to pressing problems of many of its clients which are not related to the SAW Program. Additionally, Plaintiff HRC suffers irreparable injury in that Defendants have denied many of Plaintiff HRC's members their rights under IRCA.

58. As a result of Defendants' illegal practices and procedures, Plaintiff Roman Catholic Diocese of Palm Beach (RCDPB) has suffered and will continue to suffer irreparable injury. Plaintiff RCDPD suffers directly because their mission of assisting eligible persons to obtain legal status under IRCA has been thwarted by Defendants' actions. They suffer irreparable injury indirectly because Defendants have denied some of Plaintiff RCDPB's members of their rights under IRCA.

59. As a result of the injury inflicted upon Plaintiffs, Plaintiffs seek and are entitled to reasonable attorney fees.

VI. FIRST CLAIM – DEFENDANTS' IMPOSITION UPON PLAINTIFFS OF AN UNLAWFUL BURDEN OF PROOF IS VIOLATIVE OF IRCA AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

60. Paragraphs 1 through 59 are incorporated herein by reference.

61. Section 210(a)(1) of IRCA, 8 U.S.C. § 1160(a)(1), provides that "[t]he Attorney General *shall* adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien meets [the requirements for eligibility including most importantly that the alien must have performed farm labor in the United States for at least 90 man-days]" (emphasis added).

62. Section 210(b)(3)(B) of IRCA, 8 U.S.C. § 1160(b)(3)(B)(iii), provides that in the absence of employment records or other precise documentary evidence of work history, an applicant may establish eligibility by presenting any evidence which shows the required agricultural employment "as a matter of just and reasonable inference. In such a case, the burden then shifts to the Attorney General *to disprove* the alien's evidence *with a showing* which negates the reasonableness of the inference . . ." (emphasis added). The legislative history makes clear that Congress intended there be a presumption in favor of evidence submitted by a SAW applicant, unless that evidence is specifically disproved by the Attorney General. *See* H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 97, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5853.

63. Congress therefore, through IRCA, created in eligible persons the right to obtain lawful resident status upon submission of evidence sufficient to create a just and reasonable inference that the applicant performed the required agricultural labor. This right is abridged *only* when specific evidence disproving an applicant's claim is adduced by the Defendants.

64. Defendants' policy and practice of presuming the invalidity of applicants' evidence—despite the lack of specific evidence in the record which indicates that the employer's testimony is false—and of requiring the applicant to produce employment records or other documentary evidence to overcome this presumption, is an arbitrary, capricious, and unlawful departure from the standard of proof required by IRCA and is ultra vires. Defendants have failed, and will continue to fail to apply the appropriate standard by ignoring and negating the just and reasonable inferences to be drawn from the evidence submitted by Plaintiffs and members of the class they seek to represent

and by requiring Plaintiffs to produce nonexistent documents.

65. Defendants' actions have caused, and will cause, Plaintiffs and members of the class they seek to represent to suffer injury in the form of deprivation of their statutory entitlement to lawful residence, to stays of deportation, to work authorization, and to travel abroad. The Defendants' actions are not only violative of IRCA but they violate the Due Process Clause of the Fifth Amendment of the United States Constitution.

VII. SECOND CLAIM—DEFENDANTS' IMPOSITION OF A BURDEN OF PROOF UPON PLAINTIFFS OTHER THAN THAT REQUIRED BY IRCA VIOLATES THE ADMINISTRATIVE PROCEDURES ACT

66. Paragraphs 1 through 59 are incorporated herein by reference.

67. Defendants' actions have caused, and will cause, Plaintiffs and members of the class they seek to represent to suffer injury in the form of denial of the opportunity to comment on the rule, prior to implementation, and to be apprised before submission of their applications as to the precise burden of proof required of them.

68. Defendants' decision to require work records and/or more specific documentary evidence than that submitted by Plaintiffs and members of the class they seek to represent constitutes administrative rule-making within the meaning of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* ("APA"). Defendants promulgated this rule without providing notice thereof in the Federal Register and without providing an opportunity for comment, in violation of the APA, 5 U.S.C. § 553.

VIII.[1] THIRD CLAIM – DEFENDANTS' DENIAL OF "NONFRIVOLOUS" SAW APPLICATIONS AT LEGALIZATION OFFICES PRIOR TO MARCH 29, 1988, VIOLATES PLAINTIFFS' RIGHTS UNDER IRCA AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

69. Paragraphs 1 through 59 are incorporated herein by reference.

70. IRCA specifies that any alien who presents a *nonfrivolous* application for adjustment of status under the SAW program "may not be deported or excluded and . . . shall be granted authorization to engage in employment in the United States and be provided an 'employment authorized' endorsement or other appropriate work permit until a *final determination* of the application has been made." (emphasis added). 8 U.S.C. §§ 1160(d)(2)(A) and (B), 8 C.F.R. § 210.4(b)(2). Similarly, the Defendants' regulations provide that applicants for lawful resident status shall be allowed to travel outside the United States upon submission of a "nonfrivolous" application. 8 C.F.R. § 210.4(b)(2).

71. In accordance with IRCA, the Defendants' regulations at the time that Plaintiffs and many members of the class they seek to represent submitted their applications provided that SAW applications could be denied by LO's *only* "if the alien clearly fail[ed] to meet statutory requirements or the alien admit[ed] fraud or misrepresentation in the application process." 8 C.F.R. § 103.1(n)(2), *amended at* 53 Fed. Reg. 10,064 (1988) (to be codified at 8 C.F.R. § 103:1) (proposed Mar. 29, 1988). Yet Defendants impermissibly and in violation of IRCA, their own regulations, and the Due Process Clause of the Fifth Amendment, regularly issued summary denials of SAW applications at the LO prior to March 29, 1988, for reasons other than admitted fraud or clear failure to meet the statutory requirements.

72. Congress has defined a "nonfrivolous" application as one which identifies the nature of the proof which will be submitted along with the employer, and which acknowledges both that the 90 man-days of seasonal work have been performed and the penalties for fraud. H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 97, *reprinted in* 1986 U.S. CODE CONG., & ADMIN. NEWS 5840, 5852. Congress also made clear its intent that INS not exceed these criteria in determining whether an application is frivolous due to their concern that undocumented workers be encouraged to apply for legal status. *Id.*

73. Plaintiffs and members of the class they seek to represent who submitted "nonfrivolous" applications supported by employer affidavits and who were impermissibly denied at the LO did not have their applications forwarded to the RPF for review, were not issued work authorization, and are immediately subject to deportation or exclusion. The Defendants have declined to rescind their denials, to issue employment authorization, and to grant Plaintiffs their right to travel.

74. Defendants' actions have caused, and will cause, Plaintiffs and members of the class they seek to represent to suffer injury in the form of deprivation of review of their claims by the RPF as well as deprivation of their statutory entitlement to work authorization, to stays of exclusion or deportation, and to travel abroad, pending final adjudication of their claims by the LAU. Defendants' actions are in violation of Plaintiffs' statutory and due process rights.

IX. FOURTH CLAIM – DEFENDANTS' DENIAL OF "NON-FRIVOLOUS" SAW APPLICATIONS AT LEGALIZATION OFFICES PRIOR TO MARCH 29, 1988, VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

75. Paragraphs 1 through 59 are incorporated herein by reference.

76. Until March 29, 1988, the District Director could deny SAW applications at LO's *only* in cases where the applicant was clearly not prima facie eligible or if s/he admitted to fraud or misrepresentation in the application process. 8 C.F.R. § 103.1(n)(2). Plaintiffs and members of the class they seek to represent who were denied at the LO prior to March 29, 1988, did not commit fraud or misrepresentation and submitted employer affidavits in support of their applications, thereby presenting at minimum a prima facie case that they met the statutory requirements. The Defendants denied these applications at the LO simply because they suspected the application was fraudulent and/or because no work records were submitted. Such action granted the District Director broader authority to deny on-the-spot than was granted him under the regulatory standard and amounted to a fundamental change in the general nature and requirements of the SAW application process.

77. Defendants' actions have caused, and will cause, Plaintiffs and members of the class they seek to represent to suffer injury in the form of denial of the opportunity to comment on the rule, prior to its implementation, and to be apprised before submission of their applications as to the precise burden of proof required of them.

78. Defendants' practice of denying SAW applications at local LO's prior to March 29, 1988, for mere suspicion of fraud and/or for lack of employer records, constitutes administrative rule-making within the meaning of the APA. 5 U.S.C. § 500 *et seq*. Defendants promulgated this

rule without providing notice thereof in the Federal Register and without providing an opportunity for comment, in violation of the APA. 5 U.S.C. § 553. Defendants have refused to rescind these denials.

X. FIFTH CLAIM – DEFENDANTS' NOTICES OF DENIAL OF SAW APPLICATIONS VIOLATES IRCA AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

79. Paragraphs 1 through 59 are incorporated herein by reference.

80. During the first several months of the SAW program, Defendants sent form Notices of Denial which summarily concluded only that "[y]ou have failed to prove that you have been employed in agricultural work for at least 90 man-days during the statutory period between May 1, 1985, and May 1, 1986, as required by Section 210 of the IRCA". These denials were improperly issued on form I-292, rather than form I-692, generally incorrectly informed applicants they had 15 days rather than 30 to appeal the decision, and failed to apprise them of where to send such an appeal.

81. While Defendants in recent months are no longer committing these errors in issuing denials and their grounds for denial tend to be somewhat more specific, Defendants refused to rescind previous denials and refused to send corrected Notices of Denial to all those Plaintiffs and members of the class they seek to represent who received the seriously deficient notices which Defendants initially issued.

82. Defendants' deficient notices of denial are vague, conclusory and do not state the specific reasons for the denial, thus in an arbitrary and capricious manner depriving Plaintiffs and members of the class they seek to represent of their rights under IRCA.

83. Defendants' actions have caused, and will cause, Plaintiffs and members of the class they seek to represent to suffer injury in the form of inability to know why their applications have been denied and the consequent inability to effective [*sic*] appeal.

84. 8 U.S.C. § 1160(e) provides SAW applicants whose applications are denied the right to appeal. The Defendants' own regulations also provide that such applicants are to be given "written notice setting forth the specific reasons for the denial." 8 C.F.R. § 103.3(a)(2). Defendants' actions are violative of their own statutes and regulations and are therefore also violative of the Due Process Clause of the Fifth Amendment.

XI. SIXTH CLAIM—DEFENDANTS' APPLICATION/PERSONAL INTERVIEW PROCESS VIOLATES PLAINTIFFS' STATUTORY AND FIFTH AMENDMENT RIGHTS TO DUE PROCESS

85. Paragraphs 1 through 59 are incorporated herein by reference.

86. The Defendants have established a process for intake and consideration of SAW applications which includes submission of an application, submission of documentary supporting evidence, and an interview with an INS examining officer. The interview, which is an extremely informal, one-sided interrogation conducted by the INS examining officer, is the only point at which the veracity of the applicants' testimony is examined in a live setting. The practices established by Defendants to implement the SAW program and in conducting the interview deprive Plaintiffs and members of the class they seek to represent of their right to obtain lawful resident status under the SAW Program in an arbitrary and capricious manner, in violation of INA § 210, and without due process of law in violation of the Due Process and Equal Protection guarantees of the Fifth Amendment because it fails to provide them with a fair opportunity to present their claims in the following manner:

a) The interview provides no opportunity for the applicant to be apprised of adverse evidence, including the examining officer's perceptions of discrepancies in the applicant's testimony. Although such evidence may be used by the INS to deny applications, the process denies the applicant any opportunity to cross-examine adverse witnesses or to otherwise rebut contrary evidence on the record prior to the initial denial;

b) The applicants are, in most cases, denied the opportunity to present live witnesses on their own behalf and are not permitted to obtain subpoenas to compel the attendance of witnesses or the production of books, papers, and other documentary evidence;

c) Applicants, in particular Haitian SAW's who often speak only Creole, have not been afforded the services of competent translators during the personal interview, denying them the fundamental right to understand and effectively participate in their own interviews; and

d) No verbatim recording of the personal interview is made.

87. As a result of these procedural deficiencies, Plaintiffs and members of the class they seek to represent have suffered, and will continue to suffer, injury in the form of deprivation of their statutory entitlement to lawful residence, to stays of deportation, to obtain work authorization, and to travel abroad, all without due process of law and in violation of IRCA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

A. Assume jurisdiction over this action;

B. Order that Plaintiffs may maintain this action as a class action pursuant to Rule 23, Fed. R. Civ. P.;

C. Declare that:

1) the policies and procedures employed by Defendants for adjudication of SAW applications are arbitrary, capricious and deprive Plaintiffs and members of the class they seek to represent of their rights under IRCA and the Due Process Clause of the Fifth Amendment;
2) the Defendants have applied an improper burden of proof in violation of IRCA and the Due Process Clause of the Fifth Amendment;
3) that Defendants' decision to require work records and/or more specific documentary evidence than that submitted by Plaintiffs and members of the class they seek to represent is an invalid rule under the APA, 5 U.S.C. § 553, because Defendants did not provide notice and an opportunity to comment prior to making and implementing this rule;
4) that Defendants' denials of SAW applications at Legalization Offices prior to March 29, 1988 for mere suspicion of fraud deprived Plaintiffs and members of the class they seek to represent of their rights without due process of law;
5) that Defendants' decision to deny SAW applications at Legalization Offices for mere suspicion of fraud is an invalid rule under the APA, 5 U.S.C. § 553, because Defendants did not provide notice and an opportunity to comment prior to making and implementing this rule;

6) that Defendants' vague, conclusory notices of denial which do not state the specific reasons for the denial of SAW applications deprive Plaintiffs and members of the class they seek to represent of their rights without due process of law; and
7) that Defendants' interview process is deficient under the statute and Due Process Clause of the Fifth Amendment.

D. Issue preliminary and permanent injunctive relief against the Defendants, their agents, officers and successors in office as follows:

1) Requiring Defendants to apply the appropriate burden of proof to all SAW applications and to reconsider all previous applications in light of the correct burden of proof;
2) Enjoining them from continuing to engage in policies and practices complained of in Plaintiffs' Complaint;
3) Requiring them to implement practices and procedures for use in the SAW application/personal interview process which are consistent with the rights of Plaintiffs and members of the class they seek to represent and which accord to them full statutory and due process rights, including at least:
   a) that Plaintiffs and members of the class they seek to represent be afforded, during the interview, an opportunity to clarify any alleged contradictions, discrepancies or suspect statements;
   b) that Plaintiffs and members of the class they seek to represent be apprised of and given an opportunity to rebut, during the interview, any adverse evidence which the examining officer has;

c) that Plaintiffs and members of the class they seek to represent be afforded the opportunity to present live witnesses at the interview; and

d) that Plaintiffs and members of the class they seek to represent be afforded the services of competent translators during the interview.

4) Requiring them to adjudicate SAW applications consistent with federal statutes and the U.S. Constitution;

5) Requiring them to provide notice and an opportunity to comment before implementing any rules regarding the burden and standard of proof to be used in adjudicating SAW applications;

6) Requiring them to rescind all denials of applications issued at the LO prior to March 29, 1988;

7) Requiring them to rescind notices of denial of SAW applications which do not set forth the specific reasons for the denial;

8) Requiring them to set aside all denials of SAW applications filed by Plaintiffs and members of the class they seek to represent who are subject to the practices, policies, and procedures addressed in this complaint;

9) Requiring them to reconsider all SAW applications filed by Plaintiffs and members of the class they seek to represent utilizing practices, procedures and rules regarding proof which are consistent with the rights of Plaintiffs and members of the class they seek to represent and which accord them full due process of law as described in this Complaint; and

10) Requiring them to grant stays of deportation and work authorization to Plaintiffs and members of the class they seek to represent, pending final adjudication of their SAW applications.

E. Grant to Plaintiffs their reasonable costs and attorneys' fees.

F. Grant such additional relief as the Court deems just and necessary to provide an effective remedy in this case.

Respectfully submitted,

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32 NE 54th Street
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(305) 757-8538

By: /s/ Cheryl A.E. Little
CHERYL A.E. LITTLE, ESQ.

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ROBERT WILLIAMS, ESQ.

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(305) 534-1781

By: /s/ Michael Guare
MICHAEL GUARE, ESQ.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 88-1066-CIV-ATKINS

HAITIAN REFUGEE CENTER, INC., ET AL., PLAINTIFFS

v.

ALAN C. NELSON, COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Sept. 26, 1988]

ORDER DENYING THE DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

THIS CAUSE is before the court on the defendants motion seeking a stay of paragraphs 5, 6, 7, and 8 of this court's preliminary injunction order. After careful consideration, it is

ORDERED AND ADJUDGED that the motion is *DENIED.*

The defendants have failed to adequately demonstrate the factors outlined by the Supreme Court as determinative of a stay pending appeal: (1) a likelihood of success on the merits; (2) irreparable injury; (3) likelihood of injury to other parties interested in the proceedings; and (4) public interest. *Hilton v. Braunskill*, 107 S.Ct. 2113, 2119 (1987) (citations omitted). The defendants objections stretches the meaning of the challenged provisions beyond logical interpretation.

Paragraph 5 provides that the "INS shall issue temporary work authorization to all class members pending the final outcome of the proceedings in this case and a final decision on the merits of their individual cases." The

class members are "all persons who have applied for, or will apply for, adjustment to lawful residence under the Special Agricultural Worker ("SAW") program within the eighteen month period and who have been or will be denied such status by the INS within this circuit because of the defendants' unlawful practices and policies." Paragraph 5, then, applies only to the members of the certified class. The class encompasses only those filing nonfrivolous applications. Title 8 U.S.C. § 1160(d)(2) mandates that the Attorney General grant authorization to engage in employment to all aliens who present nonfrivolous applications for adjustment of status during the application period. Therefore the provision of this court's order, when read properly in context with the entire order, extends no further that the statute and regulations promulgated thereunder. *See* 8 C.F.R. § 210.4(b).

Paragraph 7 directs the INS to allow applicants to present witnesses at the interview. The regulations specifically provide that "[a]ffidavits and other personal testimony by an applicant which are not corroborated, in whole or in part, by other credible evidence (including testimony of persons other than the applicant) will not serve to meet the applicant's burden of proof." 8 C.F.R. § 210.3(b)(3). The testimony of persons other than the applicant is not limited to documentary testimony, in fact, section 210.3(c)(3) requires that an affiant who swears to the applicant's employment must either provide a certified copy of corroborating records "*or state the affiant's willingness to personally verify the information provided.*" (emphasis added). Again, this court provides no greater allowances than contained within the regulations themselves.

Paragraph 8 requires that the interviewers particularize the evidence offered, testimony taken, credibility determinations, and other relevant information on the form I-696. The defendants argument is illogical. On the one

hand the government states that it already requires interviewers to provide sufficiently detailed accounts of the interview. On the other, it stresses that being required to do so will result in hampering the process that enables effective and efficient adjudication of SAW claims. Such a circular argument has no persuasive force. The defendants themselves noted that the form I-696 is for the purpose of noting any inconsistencies between the applicant's documents and information elicited at the interview. A provision requiring the notation of the basis of an interviewer's credibility determinations, especially when the very outcome of the interview rests on a credibility determination, is not unreasonable or overly restrictive.

Finally, the defendants challenge paragraph 6 which requires that the Legalization maintain competent translators. The defendants argue that using competent translators will delay the number of interviews that can be conducted each day and may affect the number of LOs that can be kept open. The importance of an interpreter to non-English speaking persons faced with a complex proceeding cannot be overemphasized and in fact has been recognized by numerous circuits as well as the INS itself. *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) ("A hearing is of no value when the alien and the judge are not understood."); *Tejeda-Mata v. Immigration & Naturalization Service*, 626 F.2d 721, 726 (9th Cir. 1980) ("[T]his court and others have repeatedly recognized the importance of an interpreter to the fundamental fairness of such a hearing if the alien cannot speak English fluently.") (citations omitted); *Leung v. Immigration & Naturalization Service*, 531 F.2d 166, 168 (3d Cir. 1876) (allowances should be made for language difficulties when they potentially prejudice an alien's case); *Matter of Tomas*, Interim Dec. 3032 (B.I.A. August 6, 1987).

In *Tomas*, the BIA found the presence of a competent interpreter crucial to the fundamental fairness of the hearing, especially in light of the fact that the applications for asylum at stake in the case was based largely upon the applicant's own testimony. To suggest that, in the case before this court, the stakes are any less important is unconscionable. As the court in *Augustin* pointed out, in the absence of liberty or property interests which originate in the Constitution itself, constitutionally protected interests may have their source in positive rules of law creating a substantive entitlement to a particular government entitlement. 735 F.2d at 37; *see also Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023, 1028 (11th Cir. 1982).

It is undisputed that the plaintiffs are not entitled to the fully panoply of due process rights. Congress, however, has created a right to petition for temporary residence and has provided a manner in which the alien may do so. To make it virtually impossible to take advantage of the benefit bestowed by Congress violates any notion of fundamental fairness.

This court considered and weighed the increased administrative burden that its preliminary injunction would incur upon the defendants. The stakes at risk for the plaintiffs, however, so far outweigh those costs that they pale in comparison. Therefore the defendants' motion to stay the preliminary injunction pending appeal is *DENIED*.

DONE AND ORDERED at Miami, Florida this 27th day of September, 1988.

/s/ Clyde Atkins
United States District Judge

PLAINTIFFS' EXHIBIT 28

INTERPRETER RELEASES, April 4, 1988

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benefit 100 to 300 children in New York State's foster care system.

Because of its length, the INS General Counsel's legal opinion is not reproduced here. However, the policy memorandum, which summarizes the legal opinion, is reproduced in Appendix II of this *Release*.

6. INS Moves to Reduce Legalization Backlog

The following is the text of INS Legalization Wire No. 59, sent March 15, 1988 to all INS field offices by the Service's Central Office in Washington, DC (file CO 1588):

SUBJECTS: REDUCTION OF DENIAL BACKLOG AT REGIONAL PROCESSING FACILITIES; ISSUANCE OF DENIALS AT LEGALIZATION OFFICES.

REDUCTION OF RPF DENIAL BACKLOG.

AS OF FEBRUARY 25, 1988, THERE WERE A TOTAL OF 1,180,694 CASES IN THE LAPS DATA BASE. OF THAT TOTAL, 11% OR 126,446 WERE RECOMMENDED FOR DENIAL, YET, ONLY 9,496 FINAL DENIALS HAD BEEN ISSUED. WHILE IT IS ACKNOWLEDGED THAT MANY OF THE APPLICATIONS ARE IN THE PIPELINE AND THAT MANY OTHER CASES THAT ARE RECOMMENDED FOR DENIAL WILL BE RECONSIDERED AND REVERSED AT THE RPF, THE VARIANCE INVOLVED IN THIS INSTANCE INDICATES AN UNACCEPTABLE

BACKLOG OF CASES THAT MERELY REQUIRE THE ISSUANCE OF A FINAL DECISION. ACCORDINGLY, RPF DIRECTORS ARE INSTRUCTED TO REDUCE THEIR RESPECTIVE BACKLOGS OF APPLICATIONS RECOMMENDED FOR DENIAL BY ISSUING FINAL DECISIONS WHENEVER POSSIBLE. APPLICANTS AT THE RPF WHICH FAIL TO ESTABLISH ELIGIBILITY BUT ARE TIED TO CASES PENDING FIELD INVESTIGATION SHOULD NO LONGER BE HELD PENDING COMPLETION OF THE INVESTIGATION UNLESS THE U.S. ATTORNEY'S OFFICE HAS REQUESTED THE SERVICE TO KEEP SUCH CASES OPEN.

DENIALS AT LEGALIZATION OFFICES.

LEGALIZATION WIRES NO. 45 AND NO. 48 URGED DISTRICT DIRECTORS TO DENY I-687 AND I-700 APPLICATIONS AT LEGALIZATION OFFICES (LOs) IN CASES WHERE THE APPLICANT IS CLEARLY INELIGIBLE FOR LEGALIZATION OR SAW STATUS.

WHEN THE APPLICATION CONTAINS MATERIAL INCONSISTENCIES, CONTRADICTORY INFORMATION, OR IF THERE ARE DISCREPANCIES BETWEEN MATERIAL INFORMATION IN THE APPLICATION AND THAT PROVIDED DURING THE INTERVIEW, THE CLAIMED EMPLOYMENT OR RESIDENCE IN QUESTION SHOULD BE DISALLOWED. IF ELIGIBILITY CANNOT BE ESTABLISHED WITHOUT THE DISCREDITED EMPLOYMENT OR RESIDENCE, THE APPLICANT HAS NOT MET HIS BURDEN OF PROOF AND THE APPLICATION SHOULD BE DENIED BY THE LO FOR FAILURE TO ESTABLISH ELIGIBILITY.

THE BASIS FOR DENIAL SHALL BE SET FORTH ON FORM I-692 IDENTIFYING THE SPECIFIC REASONS FOR DISALLOWING THE CLAIMED EMPLOYMENT, ENTRY DATE, RESIDENCE OR OTHER POINTS IN QUESTION. THE APPLICANT SHALL BE ADVISED OF THE RIGHT TO APPEAL AND PROVIDED WITH THE NOTICE OF APPEAL (FORM I-694). THE APPLICANT SHALL NOT BE GRANTED EMPLOYMENT AUTHORIZATION.

IF THE APPLICATION IS NOT DENIED AT THE LO, THE WORKSHEET SHOULD CONTAIN ALL THE SPECIFIC INFORMATION NECESSARY TO SUPPORT A DENIAL BY THE RPF.

Legalization Wires No. 45 and 48, referred to in this cable, are reproduced in *Interpreter Releases*, Vol. 64, No. 44, November 16, 1987, pp. 1279-1280; Vol. 65, No. 4, January 25, 1988, p. 82.

BEST AVAILABLE COPY

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U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

REFER TO THIS FILE AS
A90 466 242

JEANNETTE VELLUA
144 SE 3RD AVENUE
DELRAY BEACH, FL 33444

Date: 31 AUG 87

DECISION

Upon consideration, it is ordered that your application (I-700) for status as a temporary resident alien under Section 210 be denied for the following reasons:

YOU HAVE FAILED TO PROVE THAT YOU HAVE BEEN EMPLOYED IN AGRICULTURAL WORK FOR AT LEAST 90 MANDAYS DURING THE STATUTORY PERIOD BETWEEN MAY 1, 1985 AND MAY 1, 1986 AS REQUIRED BY SECTION 210 OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 15 days from the date of this notice. (18 days if this notice was received by mail). If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

☐ ~~Board of Immigration Appeals in Washington, D.C. on the enclosed Form I-~~ ~~is required.~~

☒ Regional Commissioner on the enclosed Form I-694. (A fee of $50.00 is required).

If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with the required fee. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest to your residence, or at the address shown in the heading to this letter.

Sincerely yours,

District Director

PLAINTIFFS' EXHIBIT 30

PLAINTIFFS' EXHIBIT 35

U.S. Department of Justice
Immigration and Naturalization Service

Legalization

A90923931

Applicant's Name	A - Number	Fee Receipt Number
[redacted] Gerard	90 923 931	XWS8803580027
Preparer's Name and I.D. Number	L.O.	Date
[redacted]	XWS	19 Nov 87
Designated Designated entity I.D. No.	Attorney or Volag I.D. No.	
8 U.S.C. 552(b)(6)		

A. Check blocks for *each* type of supporting documents attached to application:

- ☐ 1. Leases/Rent Receipts
- ☐ 2. Employer/Union - Business Records
- ☐ 3. Tax Records
- ☐ 4. U.S. licenses and I.D.'s
- ☐ 5. Marriage Certificates
- ☑ 6. Church/ Baptismal Records
- ☐ 7. Postmarked Mail
- ☐ 8. Utility/Phone Receipts
- ☐ 9. School Records
- ☐ 10. Bank/Check Records
- ☐ 11. Passports/Foreign I.D.'s
- ☐ 12. Child's Birth Certificate(s)
- ☐ 13. Affidavits of Friend(s)/ Relative(s)
- ☐ 14. Other: _____

SAW Employment Documentation

- ☐ 15. Government Employment Records
- ☐ 16. Grower Records
- ☐ 17. Farm Labor Contractor Records
- ☐ 18. Union Records
- ☐ 19. Pay Stubs/Work Receipts
- ☐ 20. Tax Records
- ☑ 21. Affidavits of Growers, Foremen, Farm Labor Contractors, or Union Officials
- ☐ 22. Other: _____

B. Examiner recommends application be: (Check appropriate block(s) below and note basis for recommendation(s) on reverse).

- ☐ 1. Granted
- ☐ 2. Denied
- ☑ 3. Denied at LO (Complete Section C or D)
- ☐ 4. Fraud Suspected
- ☐ 5. Verification Requested

Level of Suspicion (Check appropriate block below: #5 is highest level.)
☐ 1. ☐ 2. ☐ 3. ☐ 4. ☑ 5.

Denied Statutorily because of the following:

- ☐ 1. Documents do not establish: ☐ (a) Identity ☐ (b) Residence ☐ (c) Employment
- ☐ 2. Inadmissible under Section 212 (a) _____ of the Act.
- ☐ 3. In Legal Status during eligibility period.

D. Denied - Positive Fraud Established:

- ☑ 1. Documentary (List fraudulent document(s) presented, by category described above.)

I-705 affidavits

- ☐ 2. False statements

E. For Secondary Review Only:

Reviewer's Name	Date of Review
Reviewer's Signature	Reversal Warranted? ☐ Yes ☐ No

Reasons for Reversal (If applicable)

WWWW WWW

Form [illegible] 4/17/87

USP LVN

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PLAINTIFFS' EXHIBIT 36

Immigration and Naturalization Service

A26723732

Applicant's Name	A - Number	Fee Receipt Number
MARIE F. [illegible]-PHILIPPE	26-923-932	XUS8035301
Examiner's Name and I.D. Number	I.O.	Date
[redacted]	XUS	11/19/87
Qualified Designated Entity I.D. No.	Attorney or Volag I.D. No.	
8 U.S.C. 552 (h)(6)		

A. Check blocks for *each* type of supporting documents attached to application:

- ☐ 1. Leases/Rent Receipts
- ☐ 2. Employer/Union/ Business Records
- ☐ 3. Tax Records
- ☐ 4. U.S. licenses and I.D.'s
- ☐ 5. Marriage Certificates
- ☐ 6. Church/ Baptismal Records
- ☐ 7. Postmarked Mail
- ☐ 8. Utility/Phone Receipts
- ☐ 9. School Records
- ☐ 10. Bank/Check Records
- ☐ 11. Passports/Foreign I.D.'s
- ☐ 12. Child's Birth Certificate(s)
- ☐ 13. Affidavits of Friend(s)/ Relative(s)
- ☐ 14. Other: _____

SAW Employment Documentation

- ☐ 15. Government Employment Records
- ☒ 16. Grower Records
- ☒ 17. Farm Labor Contractor Records
- ☐ 18. Union Records
- ☐ 19. Pay Stubs/Work Receipts
- ☐ 20. Tax Records
- ☒ 21. Affidavits of Growers, Foremen, Farm Labor Contractors, or Union Officials
- ☐ 22. Other: I-210

B. Examiner recommends application be: (Check appropriate block(s) below and note basis for recommendation(s) on reverse).

- ☐ 1. Granted.
- ☒ 2. Denied [illegible]
- ☒ 3. Denied at LO (Complete Section C or D)
- ☐ 4. Fraud Suspected
- ☐ 5. Verification Requested

Level of Suspicion (Check appropriate block below: #5 is highest level.)

☐ 1. ☐ 2. ☐ 3. ☐ 4. ☐ 5.

C. Denied Statutorily because of the following:

- ☐ 1. Documents do not establish: ☐ (a) Identity ☐ (b) Residence ☐ (c) Employment
- ☐ 2. Inadmissible under Section 212 (a) _____ of the Act.
- ☐ 3. In Legal Status during eligibility period.

D. Denied - Positive Fraud Established:

☒ 1. Documentary (List fraudulent document(s) presented, by category described above.)

F-70.

☐ 2. False statements

E. For Secondary Review Only:

Reviewer's Name	Date of Review
Reviewer's Signature	Reversal Warranted? ☐ Yes ☐ No

Reasons for Reversal (If applicable)

Form I 696 (04/17/87)

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PLAINTIFFS' EXHIBIT 53

PKW:cw

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1066-CIV-ATKINS

HAITIAN REFUGEE CENTER, ET AL., PLAINTIFFS

vs.

ALAN C. NELSON, COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

STIPULATION OF COUNSEL

Counsel for the parties hereby stipulate and agree to the following facts for use in this case.

1. The INS does not provide interpreters at government-expense at the interview for applicants for Special Agriculture Worker (SAW) status. Applicants who do not speak English must provide their own interpreters to translate their language and English. Some INS Legalization Offices have bi-lingual employees who assist non-English speakers when they are available. The INS does not inquire into the competence or proficiency of the interpreters brought by SAW applicants to assist them beyond asking if they understand English and the language for which they are interpreting.

2. The INS Okeechobee Legalization Office has never had an employee who spoke Creole. It has and continues to have employees who are bi-lingual in English and Spanish. Until March, 1988, that office had a bi-lingual employee who spoke French and was able to speak with and interpret for Haitians.

3. As of July 1, 1988, the Legalization Offices in Florida had received 77,609 SAW applications. Of those, 30,425 were from applicants who identified themselves as Haitians.

4. INS does not record and prepare a verbatim transcript of SAW application interviews.

5. INS does not make available for inspection by applicants the worksheet prepared at Legalization Offices except pursuant to a request made under the Freedom of Information Act.

6. Prior to March 29, 1988, INS Legalization Offices in the Miami District, which comprises the State of Florida, denied 1,946 SAW applications.

For Plaintiffs:	For Defendants;
/s/ ROBERT WILLIAMS	/s/ ALLEN W. HAUSMAN
Robert Williams	Allen W. Hausman
Dated: July 8, 1988	Dated: 7/8/88

PLAINTIFFS' EXHIBIT 54

63

U.S. Department of Justice
Immigration and Naturalization Service

Application for Temporar
Special Agricultural Worker (Section 210 of the Immigra...

A98923932

Please begin with item #1, after carefully reading the instructions.

The block below is for *Government Use Only.*

Name and Location (City or Town) of Qualified Designated Entity	Fee Stamp 105
	Fee Receipt No. (This application) XWS88035301 $B
	Principal Applicant's File No. A- 90-923-9
Qualified Designated Entity I.D. No.	File No. (This applicant) A-

NOV 1987 RECEIVED MIAMI-XWS

Applicant: Do not write above this line. See instructions before filling in application. If you need more space to answer fully any question on this form, use a separate sheet and identify each answer with the number of the corresponding question. *Fill in with typewriter or print in block letters in ink.*

1 I hereby apply for status as indicated by the block checked below (check block A or B)

☐ A Group I: Temporary Residence as an alien who has performed seasonal agricultural services in the U.S. for at least 90 days during each of the 12 month periods ending on May 1, 1984, 1985, and 1986.

☒ B Group II: Temporary Residence as an alien who has performed seasonal agricultural services in the U.S. for at least 90 days during the 12 month period ending on May 1, 1986.

2 Family Name (Last Name in CAPITAL Letters)	(First Name)	(Middle Name)	3 Date of Birth (Month/Day/Year)
JEAN-Philippe	Marie	France	09/22/53

4 Other Names Used or Known by (including maiden name, if married)	5 Telephone Numbers (Include Area Codes)
SAME	Home: NONE Work:

6 Address (No. and Street)	(Apt. No.)	(Town or City)	(State/Country)	(ZIP/Postal Code)
163 N.W 57 Street	# B,	Miami	Fla	33127

7 Last Address outside the U.S. (City or Town)	(County, Province or State)	(Country)
Y. Au. 7	Carrefour Torre 10 #408	Haiti

8 Sex ☐ Male ☒ Female

9 Race ☐ Asian or Pacific Islander ☒ Black, not of Hispanic origin ☐ Other (specify below) ☐ Hispanic ☐ White, not of Hispanic origin

10 Marital Status ☒ Never Married ☐ Divorced ☐ Now Married ☐ Separated ☐ Widowed

11 Country of Citizenship: Haiti

12 Place of Birth (City or Town)	(County, Province or State)	(Country)
Terre-Neuve	Bois Neuf	Haiti

13 Have you previously applied for temporary residence as a Special Agricultural Worker?
☒ No ☐ Yes (If "Yes" give date, place of filing, and final disposition, if known)

14 Do you have any other record with I&NS?
☒ No ☐ Yes (If "Yes" give number(s))
A- _____
Other _____

15 When did you last come to the U.S.? (Month/Day/Year): 04/15/85

16 Manner of Entry (Visitor, Student, Crewman, etc.)
☐ With visa (visitor, student, etc.) specify _____
☒ Without visa Boat EWJ

17 Place of Last Entry
☒ U.S. Port of entry (City and State): Miami, Fla
☐ Border - Not through port (State) _____

18 List all Social Security Numbers used.
(1) NONE (3)
(2) (4)

19 Mother's Name (Maiden) (Last) (First) ☐ Living
NOEL Chabilia ☒ Deceased (year) 19[illegible]

20 Father's Name (Last) (First) ☒ Living
Philippe Ciseron ☐ Deceased (year) _____

PLAINTIFF'S EXHIBIT 54

Form I-700 (Rev. 05/87)Y Page 1

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Name of Organization	Location	From (Month/Year)	To (Month/Year)
	NONE		

22 Fieldwork in perishable commodities from May 1, 1983 through May 1, 1986 (List most recent first)
Information concerning employment in the United States is subject to corroboration by the employer

Name of Employer	Farm Name and Location	From (Month/Year)	To (Month/Year)	Days Worked	Type of Field Work	Type of Crop	Documentation
L. CHAVEZ D. MARTINEZ	SOUTH, Dade County Dade, Fla	MAY 85	April 86	221	LABOR WORKER	Limes and Beans	LIC-1

23 List all periods of residence in the United States since May 1, 1983 and means of support. Begin with your present address (attach an additional sheet if necessary)

Street Name and Number (Apt. No.)	City	State and ZIP Code	Means of Support	From (Month/Year)	To (Month/Year)
163 N.W 57 ST	Miami	Fla 33127	7	04/85	Present

24 I ☐ have I ☑ have not received public cash assistance from any source, including, but not limited to, the United States Government, any state, county, city or municipality. (Check the first block if you or a dependent member of your immediate family has received such assistance, explain, including the name(s) of recipient(s) and Social Security number(s) used.)

25 I ☐ have I ☑ have not been treated for a mental disorder, drug addiction or alcoholism.

26 I ☐ have I ☑ have not been arrested, convicted or confined in a prison.

27 I ☐ have I ☑ have not been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action.

Applicants for Temporary Resident status must e[illegible] that they are not excludable from the United States under the following provisions of section 212 of the INA. An applicant who is excludable under a provision of section 212 which may not be waived is ineligible for temporary resident status. An applicant who is excludable under a provision of section 212 (a) which may be waived may, if otherwise eligible, be granted temporary resident status if an application for waiver on form I-690 is filed and approved.

A. Grounds of exclusion which may not be waived:

- Listed by paragraph number of section 212 (a).

(9) Aliens who have committed or who have been convicted of a crime involving moral turpitude (does not include minor traffic violations).

(10) Aliens who have been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more.

(15) Aliens likely to become a public charge. However, an alien is not ineligible for temporary resident status under this paragraph if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

(23) Aliens who have been convicted of a violation of any law or regulation relating to narcotic drugs or marihuana, or who have been illicit traffickers in narcotic drugs or marihuana.

(27) Aliens who intend to engage in activities prejudicial to the national interests or unlawful activities of a subversive nature.

(28) Aliens who are or at any time have been anarchists, or members of or affiliated with any Communist or other totalitarian party, including any subdivision or affiliate thereof.

(29) Aliens who have advocated or taught, either by personal utterance or by means of any written matter, or through affiliation with an organization:
1) Opposition to organized government;
2) The overthrow of government by force or violence;
3) The assaulting or killing of government officials because of their official character;
4) The unlawful destruction of property;
5) Sabotage; or,
6) The doctrines of world communism, or the establishment of a totalitarian dictatorship in the United States.

(33) Aliens who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with:
1) The Nazi government in Germany;
2) Any government in any area occupied by the military forces of the Nazi government in Germany;
3) Any government established with the assistance or cooperation of the Nazi government of Germany;
4) Any government which was an ally of the Nazi government of Germany,
ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

- Provisions of 212 (e).
Aliens who at any time were exchange visitors subject to the two year foreign residence requirement unless the requirement has been satisfied or waived pursuant to the provisions of section 212 (e) of the Act.

Do any of the above provisions apply to you?
☑ No ☐ Yes (If "Yes" explain on a separate sheet of paper.)

B. Grounds of exclusion which may be waived for humanitarian purposes, to assure family unity or when it is in the public interest.

- Listed by paragraph number of section 212 (a).

(1) Aliens who are mentally retarded.

(2) Aliens who are insane.

(3) Aliens who have suffered one or more attacks of insanity.

(4) Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect.

(5) Aliens who are narcotic drug addicts or chronic alcoholics.

(6) Aliens who are afflicted with any dangerous contagious disease.

(7) Aliens who have a physical defect, disease or disability affecting their ability to earn a living.

(8) Aliens who are paupers, professional beggars or vagrants.

(11) Aliens who are polygamists or advocate polygamy.

(12) Aliens who are prostitutes or former prostitutes, or who have procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose, or aliens coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution.

(13) Aliens coming to the United States to engage in any immoral sexual act.

(16) Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation.

(17) Aliens who have been arrested and deported and who reentered the United States within five years from the date of deportation.

(19) Aliens who have procured or have attempted to procure a visa or other documentation by fraud, or by willfully misrepresenting a material fact.

(22) Aliens who have applied for exemption or discharge from training or service in the Armed Forces of the United States on the ground of alienage and who have been relieved or discharged from such training or service.

(31) Aliens who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

Do any of the above provisions apply to you?
☐ No ☐ Yes (If "Yes" explain on a separate sheet of paper.)

29 If your native alphabet is in other than Roman letters, write your name in your native alphabet. Marie-France Jean Philibbe.	30 Language of native alphabet Créole
31 Signature of Applicant - I CERTIFY, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I hereby consent and authorize the Service to verify the information provided, and to conduct police, welfare and other record checks pertinent to this application. x Marie-France Jean Philippe	32 Date (Month/Day/Year) 10/24/87
33 Signature of person preparing form, if other than applicant. I DECLARE that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge. [illegible signature]	34 Date (Month/Day/Year) 10/24/87
35 Name and Address of person preparing form, if other than applicant (type or print) Joseph Dumont 1131 N.W 6th St Miami Fla 33150	51 Occupation of person preparing form Priest

QUALIFIED DESIGNATED ENTITY USE ONLY

37 Reviewed by (Print or Type Name)	38 Signature	39 Date

IMMIGRATION AND NATURALIZATION SERVICE USE ONLY

40 Recommendation: Temporary Residence	41 Recommendation: Waiver of Excludability under	
☐ Approved ☑ Denied	Section 212 (a) ______ is ☐ Approved	☐ Denied
42 Class of Admission T S-2.	43 Place of Adjustment X LUS	44 Date of Adjustment
45 Recommended by (Print or type Name and Title) [redacted]	46 Signature [redacted]	47 ID No. / 48 Date 11/19/87
49 Final Action: Temporary Residence ☐ Approved ☐ Denied	50 Director Regional Processing Facility	51 ID No. / 52 Date

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OMB# 1115-0137

U.S. Department of Justice
Immigration and Naturalization Service

Affidavit Confirming Seasonal Agricultural Employment of an Applicant for Temporary Residence Status Under Section 210 of the Immigration & Nationality Act

99

Please begin with item #1, after carefully reading the instructions.

A. INFORMATION ABOUT APPLICANT—To be completed by the applicant.

1. Name (Family Name in CAPITAL Letters) (First Name) (Middle Name)	2. Date of Birth (Month/Day/Year)
JEAN-PHILIPPE MARIE-FRANCE	09/22/53
3. Address (No. and Street) (Apt. No.) (City or Town) (State) (ZIP Code)	**4. Telephone Number (Include Area Code)**
163 N.W 57 ST MIAMI FLA 33127	NONE
5. Place of Birth (City or Town) (Country, Province or State) (Country)	**6. Country of Citizenship**
TERRE-NEUVE , BOIS NEUF HAITI	HAITI

B. INFORMATION ABOUT YOU, THE PERSON MAKING THE AFFIDAVIT.

7. Name (Family Name in CAPITAL Letters) (First Name) (Middle Name)	8. Telephone Number (Include Area Code)
CHARLES LECIUS --------	(305)576-8906

9. Address (No. and Street) (Apt. No.)	(City or Town)	(State)	(ZIP Code)
176 N.W 57 STREET	MIAMI	FLA	33127

10. Relationship to Applicant (Check which block(s) applies)

☐ Grower ☐ Foreman ☒ Farm Labor Contractor ☐ Union Official (Title) _____

☐ Other (explain) _____

C. FIELD WORK IN PERISHABLE COMMODITIES

11. Name of Farm SOUTH DADE GROVERS County DADE State FLA Phone No. 305) 248-7120	Name of Employer DAVID JOSE MARTINEZ	Dates Employed From MAY 85 APRIL 86

Man Days Worked	Type of Fieldwork	Type of Crop	Name Used By Applicant If Other Than Name In Block 1.	Social Security Number Used
	LABOR FIELD	LIES AND		
221	WORKER	BEANS PICKER	SAME	NONE

12. Name of Farm County State Phone No. ( )	Name of Employer	Dates Employed From To

Man Days Worked	Type of Fieldwork	Type of Crop	Name Used By Applicant If Other Than Name In Block 1.	Social Security Number Used
XX	XX	XX	XX	XX

13. Name of Farm County State Phone No. ( )	Name of Employer	Dates Employed From To

Man Days Worked	Type of Fieldwork	Type of Crop	Name Used By Applicant If Other Than Name In Block 1.	Social Security Number Used

Continued on other side.

67

2 AGRICULTURAL EMPLOYMENT (Continued,

1 Identify the source of this information by checking the appropriate blocks below and state how you know the information to be true. Records kept by [ ] Grower, [ ] Union, [X] Farm Labor Contractor or [ ] Personal Knowledge Statement	15 Please sign and submit copies of the documents identified in item #14 or state the reason(s) for not supplying such documents. [X] Signed, supporting documentation is attached [ ] Supporting documentation is not attached (explain) Statement:

16 If the name of the applicant in block #1 is not the name under which the applicant worked as shown in Section C, please:
(a) attach a recognizable photograph of the applicant and sign your name in ink across the back of the photograph; or
(b) explain how you know that the applicant is, in fact, the person who performed the work.

I am willing to personally confirm this information, if requested. I declare and affirm under penalty of perjury that the information on this affidavit is true and correct to the best of my knowledge and belief.

Signature of Affiant

Signature of Applicant

Form I-705 (02-21-87)

Instructions for Form I-705
Affidavit of Seasonal Agricultural Employment

Preparation of Affidavit:
This affidavit is to be completed under oath by agricultural producers, their foremen, union officials, farm labor contractors, or other persons with specific knowledge of the employment history of a person seeking temporary residence status as a Special Agricultural Worker (SAW). A separate affidavit must be completed for each applicant and must be typewritten or printed legibly in ink. The affidavit must be completed in full. If extra space is needed to answer any item, attach a continuation sheet and indicate the item number. Affiants may provide other information not requested on this form which may help to establish the performance of qualifying employment by the applicant.

Eligibility Criteria for Special Agricultural Workers:
Section 210 of the Immigration and Nationality Act provides for the granting of temporary residence status to aliens who have performed field labor in perishable agricultural commodities in the United States for at least 90 man-days during the twelve month period ending May 1, 1986. Aliens who can also document performance of field work in perishable commodities for at least 90 man-days in the years ending May 1, 1984 and May 1, 1985 will be adjusted to permanent resident status one year earlier than those who cannot. A man-day is any day in which not less than one hour of the requisite labor is performed for one or more employers.

Confidentiality:
As required by section 210 of the Act, the information provided in this affidavit is confidential and may only be used by the Immigration and Naturalization Service in making a determination on the application for temporary resident status filed by a special agricultural worker. The information furnished shall not be made available to any other government agency.

4. **Work Performed Under an Assumed Name:**
(a). Instructions for Applicant:
In cases where you worked under an assumed name, you must prove that you are, in fact, the person who used that name. To do this, you should provide a recognizable photograph of yourself for identification by the affiant.
(b). Instructions for Affiant:
If you recognize the applicant from the photograph as the person who performed the work, sign the back of the photograph in ink and attach it to the affidavit.

5. **Penalties for False Statements:**
Whoever provides information in support of an application under section 210 of the Act and who knowingly and willfully conceals or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry or creates or supplies a false writing or document for use in making such application will be subject to criminal prosecution. Such false information is not protected by the confidentiality provisions of section 210 of the Act.

LIMES • TOMATOES • BEANS • PICKLES

LECIUS CHARLES

176 N.W. 57th STREET • MIAMI, FL 33127
(305) 693-6923

1. Name of Farmworker MARIE FRANCE JEAN PHILIPPE
   (whose picture is affixed to this document)
2. Social Security Number NONE
3. Name Farmworker used to work MARIE FRANCE JEAN PHILIPPE
4. Alien number of Farmworker (if he/she has one) NONE
5. Dates of Employment MAY 85 TO APRIL 86
6. Number of Hours Worked Per Day 6 TO 8 HOURS
7. Position LABOR FIELD WORKER
8. Duties Performed LIMES AND BEANS PICKER
9. Resident Address of Employer 176 N.W 57 ST MIAMI FLA 33127
10. Phone of Employer (305) 576-8906

I am willing to provide more information, if necessary. I also declare under penalty of perjury that the information provided is true and correct.

Attached hereto are the records evidencing his/her employment(if available)

Lecius Charles
Contractor's signature

Lecius Charles
~~Employer's signature~~

PHOTO

WITNESS MY HAND AND OFFICIAL SEAL
THIS THIRTY 1ST DAY OF OCTOBER 1987
STATE OF FLORIDA.
COUNTY OF DADE.

Fee Receipt Number: 098923932 — XI0558085301(

Applicant's Name: Marie F. San-Pinitte

Examiner's Name and I.D. Number: [redacted]

Qualified Designated Entity I.D. No.: 5 U.S.C. 552 (b)(6)

A - Number: 90-923-932

L O: XI03

Attorney or Volag I.D. No.

Date: 11/19/87

A. Check blocks for *each* type of supporting documents attached to application:

		SAW *Employment Documentation*
[ ] 1. Leases/Rent Receipts	[ ] 8. Utility/Phone Receipts	[ ] 15. Government Employment Records
[ ] 2. Employer/Union/ Business Records	[ ] 9. School Records	[X] 16. Grower Records
[ ] 3. Tax Records	[ ] 10. Bank/Check Records	[X] 17. Farm Labor Contractor Records
[ ] 4. U.S. licenses and I.D.'s	[ ] 11. Passports/Foreign I.D.'s	[ ] 18. Union Records
[ ] 5. Marriage Certificates	[ ] 12. Child's Birth Certificate(s)	[ ] 19. Pay Stubs/Work Receipts
[ ] 6. Church/ Baptismal Records	[ ] 13. Affidavits of Friend(s)/ Relative(s)	[ ] 20. Tax Records
[ ] 7. Postmarked Mail	[ ] 14. Other:	[X] 21. Affidavits of Growers, Foremen, Farm Labor Contractors, or Union Officials
		[ ] 22. Other: I-705

B. Examiner recommends application be: (Check appropriate block(s) below and note basis for recommendation(s) on reverse).

[ ] 1. Granted.

[X] ~~2. Denied.~~

[X] 3. Denied at LO (Complete Section C or D)

[ ] 4. Fraud Suspected

[ ] 5. Verification Requested

Level of Suspicion (Check appropriate block below: #5 is highest level.) [ ] 1. [ ] 2. [ ] 3. [ ] 4. [ ] 5.

C. Denied Statutorily because of the following:

[ ] 1. Documents do not establish: [ ] (a) Identity [ ] (b) Residence [ ] (c) Employment

[ ] 2. Inadmissible under Section 212 (a) ____________ of the Act.

[ ] 3. In Legal Status during eligibility period.

D. Denied - Positive Fraud Established:

[X] 1. Documentary (List fraudulent document(s) presented, by category described above.) I-705

[ ] 2. False statements

E. For Secondary Review Only:

Reviewer's Name ____________ Date of Review ____________

Reviewer's Signature ____________ Reversal Warranted? [ ] Yes [ ] No

Reasons for Reversal (If applicable)

____

I-696 (01/17/87)

Supreme Court of the United States

No. 89-1332

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed June 4, 1990.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted.

June 4, 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/40001

Supreme Court, U.S.
FILED
AUG 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1332 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

DAVID V. BERNAL
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

The Immigration Reform and Control Act of 1986 provides that there shall be no judicial review of a "determination respecting an application" for Special Agricultural Worker (SAW) status except in the review of a deportation or exclusion order (8 U.S.C. 1160(e)). The question presented is whether this provision precludes a federal district court from exercising jurisdiction over an action alleging a pattern and practice of procedural due process violations by the Immigration and Naturalization Service in its treatment of individual applications under the SAW program.

PARTIES TO THE PROCEEDING

Petitioners, defendants below,* are Gene McNary, Commissioner of Immigration and Naturalization; Richard B. Smith, District Director, Immigration and Naturalization Service, District Office Number 6; Thomas Fisher, District Director, Immigration and Naturalization Service, District Office Number 26; Lewis DeAngelis, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region; Immigration and Naturalization Service, Department of Justice; James A. Puleo, Acting Associate Commissioner for Examination, Immigration and Naturalization Service; Terrance M. O'Reilly, Assistant Commissioner for Legalization, Immigration and Naturalization Service; Dick Thornburgh, Attorney General of the United States; and the United States Department of Justice. The respondents, plaintiffs below, are Haitian Refugee Center, Inc., a not-for-profit corporation; Roman Catholic Diocese of Palm Beach; Marie Gizele Angrand; Germaine Cadet; Rosita Delva; Dieumercie Desir; Joseph Saintil Dieudonne; Gerard Henry; Marie France Jean-Philippe; Novamise Julien; Francklin Joseph; Sylvia Lindor; Recol Neus; Rose Pierrecina Lebon Pierre; Marie Philomene Servilien; Hector Trejo Tamayo; Juan Tamayo Vega; Marie Raquel Viera; and Jeanette Vixama.

* The individual petitioners, who are parties in their official capacities, have been substituted for their predecessors in office, Alan C. Nelson, Perry Rivkind, Kenneth Pasquarell, William Chambers, Richard Norton, William Slattery, and Edwin Meese III, respectively. See Sup. Ct. R. 35.3.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1332

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 872 F.2d 1555. The opinion and order of the district court (Pet. App. 18a-54a, 55a-57a) are reported at 694 F. Supp. 864.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1989. A petition for rehearing was denied on October 10, 1989. Pet. App. 58a-59a. On January 3, 1990, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 17, 1990. The petition was filed on February 20, 1990 (a Tuesday following a Monday holiday), and granted on June 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of Sections 106, 210, and 279 of the Immigration and Nationality Act, 8 U.S.C. 1105a, 1160, and 1329, and 28 U.S.C. 1331 are set forth in an appendix (App., *infra*, 1a-4a).

STATEMENT

A. The Statutory Scheme

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, "represent[ed] the most comprehensive immigration reform effort in the United States in 20 years." S. Rep. No. 132, 99th Cong., 1st Sess. 18 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 51-55 (1986) (describing history of legislation). As an integral part of that effort, Congress established two major legalization programs that permitted certain undocumented aliens in the United States to obtain lawful resident status. The first legalization program applied to aliens who had resided continuously and unlawfully in the United States since January 1 1982. 8 U.S.C. 1255a. The second program applied to "Special Agricultural Workers" (SAW)—those aliens who had performed at least 90 days of qualifying agricultural work in the United States during the 12 months ending May 1, 1986. 8 U.S.C. 1160(a).

IRCA provided that applicants for SAW status had to submit their applications during an 18 month period beginning June 1, 1987. 8 U.S.C. 1160(a)(1)(A). If an applicant established (1) 90 days of qualifying agricultural work, and (2) his admissibility to the United States as an immigrant, the Attorney General was required to adjust the alien's status to that of temporary resident. 8 U.S.C. 1160(a)(1). In a second phase of the SAW program, such aliens would become eligible for adjustment of status to that of aliens lawfully admitted for permanent residence. 8 U.S.C. 1160(a)(2).

Congress conferred authority for administering the legalization programs on the Attorney General, who in turn has delegated that authority to the Commissioner of Immigration and Naturalization. 8 U.S.C. 1160, 1255a; 8 C.F.R. 2.1. Under regulations of the Immigration and Naturalization Service (INS), SAW applications were initially processed by specially created legalization offices. The legalization offices were required to interview each applicant personally, and in those interviews the applicant had to establish eligibility for SAW status. 8 C.F.R. 210.1(h), 210.2(c)(2)(iv) and (c)(4)(i). Thereafter, the applications were adjudicated by one of the four INS Regional Processing Facilities. 8 C.F.R. 210.1(p).[1] Whenever a SAW application was denied, INS regulations required that the alien be given written notice setting forth the reasons for the denial and the applicant's right to an administrative appeal. 8 C.F.R. 103.3(a)(2), 210.2(f).

IRCA expressly limits the scope of administrative and judicial review in the SAW program. Section 1160(e)(1) of IRCA provides: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. 1160(e)(1). The subsection then directs the Attorney General to establish an "appellate authority to provide for a single level of administrative appellate review," and provides that "[t]here shall be judicial review of such a denial [of SAW status] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160(e)(2)(A) and (e)(3)(A).[2] The

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[1] As amended, the regulations permitted INS district directors to approve SAW applications if a Regional Processing Facility had required a second interview and the alien established eligibility, or to deny SAW applications filed by applicants who were ineligible for approval. 8 C.F.R. 103.1(n)(2).

[2] Congress enacted a virtually identical provision for the general legalization program. 8 U.S.C. 1255a(f).

cited provision, 8 U.S.C. 1105a, provides for the exclusive review of an order of deportation in the courts of appeals, see *Foti* v. *INS*, 375 U.S. 217 (1963); *INS* v. *Chadha*, 462 U.S. 919, 938 (1983), and for the exclusive review of an order of exclusion in habeas corpus proceedings.

The legalization programs attracted "amnesty" applications on an unprecedented scale. According to information reported to Congress in May 1989, nearly 3.1 million applications were filed. Of the 1,843,744 applications adjudicated as of May 1989, 95.7% were approved. In the general legalization program, the approval rate was 96.6%, while in SAW, the approval rate was 92.9%.[3] INS anticipated that the overall approval rate for the SAW program would decline somewhat as it completed investigation of cases for fraud. *Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 400, 403 (1989) (statement of Alan C. Nelson, INS Commissioner).

B. The Present Controversy

1. Respondents are the Haitian Refugee Center (HRC); the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach, Florida (MRS); and 17 individual aliens whose SAW applications were denied. On June 13, 1988, respondents brought suit against petitioners in the United States District Court for the Southern District of Florida. Respondents alleged that INS had adopted unlawful policies and practices in making SAW determinations, and that these policies and practices were resulting in erroneous denials of SAW applications.[4] Respondents claimed that these policies and practices violated IRCA and the Due Process Clause. On behalf of themselves and a class consisting of SAW applicants in the Eleventh Circuit who had been or would be denied SAW status because of the alleged unlawful practices, respondents sought declaratory, injunctive, and mandatory relief against INS. Pet. App. 2a, 19a-20a.

Following a hearing, the district court granted respondents' motion for class certification and for a preliminary injunction. Pet. App. 55a-57a. Initially, the court held that it had subject matter jurisdiction over the action, notwithstanding IRCA's specific and limited provisions for judicial review. *Id.* at 36a-40a. The court reasoned that respondents' complaint fell under its general federal question jurisdiction because it did not challenge INS's determination in any particular case. "[R]ather," the court explained, the complaint "attacks the manner in which the entire program is being implemented." *Id.* at 38a, citing *Haitian Refugee Center (HRC)* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), and *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985).

The court also held that the organizational plaintiffs (HRC and MRS) had standing to pursue their claims against the operation of the SAW program. Pet. App. 40a-44a. The court noted that HRC, whose main function is to provide legal representation to Haitian refugees, had alleged a direct injury to its ability to assist

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[3] 1,768,089 applications were filed under the general legalization program, while 1,301,804 were filed under SAW.

[4] In particular, respondents alleged that INS (1) had imposed an improper burden of proof on applicants by insisting upon corroborating evidence (in addition to affidavits submitted by applicants) to establish the requisite 90 days of agricultural employment; (2) had improperly denied "non-frivolous" applications at the legalization office level, thereby depriving applicants of work authorization pending review of their applications; (3) had issued notices of denial that inadequately described the grounds for denial and provided inaccurate information regarding appeals; and (4) had conducted improper interviews by (i) failing to provide interpreters for applicants, (ii) failing to disclose adverse evidence to applicants to permit rebuttal, and (iii) refusing to allow applicants to present witnesses in support of their claims. Pet. App. 19a-20a.

the Haitian refugee community, and an indirect injury to its membership. As to MRS, the court noted that under IRCA it was a "qualified designated entity," authorized to assist in the preparation and submission of applications for SAW status.[5] MRS alleged that INS's practices, by discouraging aliens from applying for SAW status, had prevented it from performing its mission. *Id.* at 41a.

Turning to respondents' claim for preliminary relief, the court concluded that respondents were likely to prevail on the merits and had satisfied the other requisites for a preliminary injunction. The court therefore entered a detailed preliminary injunction ordering INS, *inter alia*, to vacate the denials issued to certain SAW applicants and to remedy the violations that the court believed had affected the determinations in those cases. Pet. App. 55a-57a.[6] Other paragraphs of the injunction ordered INS to take the following steps with regard to the processing of SAW applications (*id.* at 57a):

> (6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and

[5] "Qualified designated entities" were created by IRCA in order to allow aliens to file applications with nongovernmental intermediaries who would forward the applications to the Attorney General. 8 U.S.C. 1160(b)(1)(A) and (b)(2), 1255a(c)(1) and (c)(2). Congress provided for such entities in order to encourage undocumented aliens to apply for legalization without fear of exposure to INS. H.R. Rep. No. 682, *supra*, Pt. 1, at 73. To that end, the files of such entities relating to the assistance of an alien with respect to an application are confidential, and INS lacks access to those files without the alien's consent. 8 U.S.C. 1160(b)(4), 1255a(c)(4).

[6] The injunction ordered INS to reopen denials involving: defective notices of denial; applications denied on the basis of adverse evidence that INS had considered without the applicants' knowledge; and applications determined under an incorrect burden of proof. Pet. App. 55a-56a. Petitioners did not challenge those paragraphs of the preliminary injunction on appeal (except to the extent that petitioners challenged the district court's jurisdiction). *Id.* at 2a-3a.

> Haitian Creole, and translators in other languages shall be made available if necessary;
>
> (7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, co-workers, and any other individuals who may offer testimony in support of the applicant;
>
> (8) The Interviewers shall be directed to particularize the evidence offered, testimony taken, credibility determinations, and any other relevant information on the form I-696.[7]

2. Petitioners sought review of paragraphs (6), (7), and (8) of the preliminary injunction in the court of appeals, and challenged the district court's jurisdiction to entertain this action. The court of appeals affirmed. Pet. App. 1a-17a. The court began by holding that 8 U.S.C. 1160(e) did not preclude the district court from exercising federal question jurisdiction. Stating that it had "previously considered and rejected this argument," the court explained that *HRC* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*, established the propriety of district court jurisdiction to review "allegations of systematic abuses by INS officials." Pet. App. 9a-10. Applying the principles announced in those cases, the court said (*id.* at 11a):

> In this action, appellees do not challenge the merits of any individual status determination; rather, like the plaintiffs in *Haitian Refugee Center* v. *Smith* and *Jean* v. *Nelson*, they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights.

[7] The court subsequently granted respondents' motion to compel INS to produce up to 20,000 "legalization files" pertaining to the class members, notwithstanding the confidentiality provisions in IRCA protecting against disclosure of such files, see 8 U.S.C. 1160(b)(6). The government's petition for mandamus challenging that order was denied by the court of appeals. *In re Nelson*, 873 F.2d 1396 (11th Cir. 1989) (per curiam).

In addition, the court found that the plaintiffs were not obligated to exhaust any administrative remedies, and rejected petitioners' argument that the organizational plaintiffs lacked standing. Pet. App. 11a-12a.

After disposing of the jurisdictional issues, the court of appeals held that the issuance of the preliminary injunction did not constitute an abuse of discretion. The court stated that the right of SAW applicants to apply for temporary residency, and to substantiate their claims to eligibility, must be accorded the protection of due process. Applying the three-factor test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court upheld the provisions of the injunction requiring INS to provide adequate translators at SAW interviews, to permit applicants to call witnesses at such interviews, and to particularize evidence offered, testimony taken, and evidentiary determinations on its forms for such interviews. Pet. App. 13a-17a.

SUMMARY OF ARGUMENT

The sole question presented is whether the judicial review provisions of IRCA—which permit review of a "determination respecting" a SAW application only in two designated types of proceedings—bar a federal district court, in a completely different proceeding, from exercising general jurisdiction over the individual and organizational claims in this case. We submit that the answer is yes. That conclusion flows from the language and design of the statute; it also accords with the holding of the D.C. Circuit based on a detailed analysis of counterpart provisions in the general legalization program. *Ayuda, Inc.* v. *Thornburgh*, 889 F.2d 1325, 1329-1340 (1989), petition for cert. pending, No. 89-1018. The Eleventh Circuit's holding to the contrary, empowering district courts to review broadscale procedural claims under the SAW program, should be reversed.

A. IRCA precludes "judicial review of a determination respecting an application" for SAW status except in the

context of a proceeding to review an order of deportation or exclusion. Deportation orders, in turn, are reviewable exclusively in the courts of appeals; exclusion orders are reviewable exclusively in habeas corpus proceedings. These provisions plainly cut off other sources of district court jurisdiction with respect to all claims within their coverage. When Congress establishes a particular review mechanism, courts are not free to fashion alternatives to the specified scheme. Thus, IRCA prevents district courts from asserting federal question jurisdiction under 28 U.S.C. 1331, or general immigration jurisdiction under 8 U.S.C. 1329, to review "determination[s] respecting" SAW applications.

The legislative history confirms the natural reading of IRCA's text. Congress perceived that the massive scale of the legalization programs required significant limitations on judicial review. Consequently, the legislation ultimately enacted was intended to authorize only a limited form of review of individual cases in the deportation or exclusion context—not the sort of sweeping class action brought here.

B. Respondents' complaint challenges determinations within the scope of IRCA's review provisions, and therefore cannot be brought in this action. The individual respondents challenged a variety of INS procedures used to adjudicate their SAW applications. These claims could have been raised before INS's Administrative Appeals Unit, and subsequently presented to a court after entry of an exclusion or deportation order. See *INS* v. *Chadha*, 462 U.S. 919, 938 (1983). Consequently, they are properly characterized as seeking review of a "determination respecting an application" for SAW status under 8 U.S.C. 1160(e)(1).

IRCA's review provisions cannot be evaded by respondents' claim that the individual applicants are challenging only "practices," "policies," or "procedures," and not the ultimate denials of their applications. The practices in question cannot be divorced from their impact on individ-

ual applications. Cf. *Heckler* v. *Ringer*, 466 U.S. 602 (1984). Indeed, if the complaint were construed as challenging INS's practices in such an abstract and isolated fashion, the complaint would not even have identified agency action amenable to judicial review under general principles of reviewability. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3172 (1990).

But a fair reading of the complaint reveals that respondents have sought review of INS's practices as they affect individual application denials, and there can be no doubt that this action is barred by the express terms of Section 1160(e)(1). It is no answer to this bar that respondents have not asked the district court actually to grant anyone SAW status. The phrase "determination respecting an application" encompasses both procedures and final decisions. Cf. *Heckler* v. *Ringer*, *supra*. And the preclusion of district court review does not raise constitutional issues of the sort noted in *Webster* v. *Doe*, 486 U.S. 592, 603 (1988), because the individual applicants have an opportunity for judicial review after entry of a final order of deportation or exclusion.

Nor does IRCA permit the organizational respondents to sue in district court. "[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Institute*, 476 U.S. 340, 349 (1984). That is the case here with respect to the organizational plaintiffs. Permitting such groups to sue would undermine the plan for administrative and judicial review wrought by Congress, and such suits are not required to ensure the protection of any statutory interest.

C. The Eleventh Circuit failed to analyze either the structure of IRCA or its specific language, instead relying on lower court precedents under the general immigration laws that have upheld a "pattern and practice" exception to 8 U.S.C. 1105a. In our view, those cases are

wrongly decided, but in any event do not support a similar result under IRCA's quite different language. IRCA does not simply incorporate the judicial review apparatus applicable to deportation or exclusion cases, it goes farther by adding an explicit prohibition on any other form of judicial review.

The experience of district courts in applying the "pattern and practice" theory under IRCA provides additional support for the view that Congress did not intend to sanction it. That theory has an inevitable tendency to launch the judiciary not only into wholesale challenges to agency programs, but also into an unaccustomed, and unwarranted, role of administering a program entrusted to the hands of the Attorney General. Given the primary responsibility of the political branches in formulating and executing immigration policy, and the correspondingly limited role for the judiciary, courts should be particularly hestitant to depart from the case-by-case method of review that Congress provided under IRCA.

ARGUMENT

THE DISTRICT COURT LACKED JURISDICTION OVER THE COMPLAINT

A. IRCA Precludes The Exercise Of General District Court Jurisdiction Over Any "Determination Respecting An Application For Adjustment Of Status"

1. In framing IRCA, Congress carefully structured the SAW program to channel all judicial review of INS determinations to the courts of appeals in the review of a deportation order (or district courts in exclusion proceedings), thereby cutting off general sources of jurisdiction in federal district courts.

The Act declares in all-encompassing terms: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this

subsection." 8 U.S.C. 1160(e)(1). In the following paragraphs, the subsection spells out the precise procedures intended to provide the exclusive method of review. The subsection requires the establishment of "a single level of administrative appellate review of such a determination," and unequivocally states that "[t]here shall be judicial review of such a denial [of a SAW application] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160(e)(2)(A) and (e)(3)(A). Section 1105a(a), in turn, provides that a petition for review in the court of appeals "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation," while exclusion orders are reviewable exclusively in habeas corpus proceedings.[8] 8 U.S.C. 1105a(b). Congress could hardly have chosen clearer or more forceful language to express its intention to preclude *any* judicial review of a "determination respecting an application" for SAW status, other than in the specified review proceedings applicable to individual deportation or exclusion orders.

In light of IRCA's clear directions, district courts are not free to draw on their federal question jurisdiction under 28 U.S.C. 1331, or on their jurisdiction granted under the immigration laws, 8 U.S.C. 1329,[9] to entertain

[8] 8 U.S.C. 1105a(a)(9) may provide a limited exception for review of a deportation order in habeas corpus proceedings at the behest of an alien who is "held in custody." Compare *Marcello* v. *District Director*, 634 F.2d 964, 966-972 (5th Cir.) (finding such jurisdiction to exist), cert. denied, 452 U.S. 917 (1981), with *Daneshvar* v. *Chauvin*, 644 F.2d 1248, 1251 (8th Cir. 1981) (limiting the provision to "review of the denial of discretionary relief where deportability itself is not an issue"). "The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission." *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982).

[9] 8 U.S.C. 1329 is a general provision in the immigration laws that states, in pertinent part: "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter." The provision was enacted in 1952 (Immigration and Nationality Act, ch. 477, § 279, 66 Stat. 230), based on a nearly identical predecessor dating from 1917 (Act of Feb. 5, 1917, ch. 29, 39 Stat. 893-894)—long before Congress eliminated the amount-in-controversy requirement for invoking federal question jurisdiction under 28 U.S.C. 1331. See Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721). Section 1329 was enacted in a chapter devoted to penalty provisions, and, given its context and history, could reasonably be interpreted to apply only to such matters. See H.R. Rep. No. 1354, 82d Cong., 2d Sess. 222-223 (1952). Although courts have not so confined Section 1329, its general grant of jurisdiction uses similar language to 28 U.S.C. 1331, and therefore has been accorded a similar reach—limited, of course, to immigration matters. See *Acosta* v. *Gaffney*, 558 F.2d 1153, 1156 (3d Cir. 1977) ("[I]n view of the similarity of the language used in the two sections we think that section [1329] should be given an interpretation, similar to that which is accorded section 1331 * * *.").

collateral attacks on procedures used to adjudicate SAW applications. The exercise of either source of general power is barred by the precise and specific language of IRCA. It is well settled that when Congress has established a particular review mechanism, courts are not free to fashion alternatives to the specified scheme. See *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988); *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 419-422 (1965); *Yakus* v. *United States*, 321 U.S. 414, 429-431 (1944).[10]

[10] The Administrative Procedure Act (APA) reflects a similar principle. See 5 U.S.C. 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action * * * in a court of competent jurisdiction."). Additionally, when Congress specifies that judicial review of agency action shall be had in the courts of appeals—as Congress has required for at least the vast majority of deportation orders—district courts cannot assert general jurisdiction to review the same actions. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("Litigants may not evade these provisions [requiring review of FCC orders in the courts of appeals] by requesting the District Court to enjoin action

In this case, permitting review of an alleged pattern and practice of INS conduct in district court would lead to a "rather peculiar" division of jurisdiction, because the courts of appeals, in reviewing deportation orders, would hear "only the application of the statute in presumably less important individual cases," while district courts would review "the much more important cases involving broad questions * * * that would apply to a whole class of aliens." *Ayuda, Inc.* v. *Thornburgh*, 880 F.3d 1325, 1331-1332 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018. The structure of the statute refutes the view that Congress intended such an anomaly. The statute contemplates administrative review of objections to a denial of SAW status (8 U.S.C. 1160(e)(2)), and, by incorporating 8 U.S.C. 1105a, requires that such administrative remedies be exhausted. Carving out a particular class of claims for immediate district court review frustrates that objective.

Moreover, permitting such actions breeds confusion about the appropriate record and standard of review. IRCA specifically designates the record for judicial review, and formulates a highly restrictive standard for reversal. 8 U.S.C. 1160(e)(3)(B). There is no ready way for district courts to apply those standards in broad class actions addressing generalized issues divorced from the circumstances of a particular case. Indeed, the structure of the Act—focusing as it does on judicial review of individual determinations—reveals Congress's intention to insist that courts review agency action under IRCA not at the "program" level, but as applied in each particular case. The facial challenges to agency policy mounted in this case and in *Ayuda* cannot be squared with that objective.

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that is the outcome of the agency's order."); *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744-745 (1985). See generally 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3943, at 322-323 (1977); *id.* at 326-329 (Supp. 1990).

2. The legislative history and background against which IRCA was enacted are fully consistent with the import of Section 1160(e)'s language. The Senate precursors to IRCA would have gone farther than the statute later enacted by precluding all judicial review of decisions or determinations involving the legalization program.[11] In explaining the rationale underlying such a complete prohibition of judicial review, the Senate Report on a 1985 bill noted that since the legalization program was of a "magnitude * * * unique in history," it would require a "major managerial effort * * * to review the applications and assure that applicants qualified to be legalized will actually receive this benefit and that other applicants will not." S. Rep. No. 132, *supra*, at 48. Concerned about the incentives and opportunity of ineligible applicants to delay the disposition of their cases and derail the program, the Committee stated that the purpose of precluding all judicial review was "to insure reasonably prompt final determinations" so that dilatory tactics could not inter-

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[11] A Senate bill introduced in the 98th Congress (relating to the general legalization program only) expressly prohibited all judicial review. See S. 529, 98th Cong., 1st Sess. § 301(a) (1983) ("No decision or determination made by the Attorney General under this section may be reviewed by any court of the United States or of any State."); S. Rep. No. 62, 98th Cong. 1st Sess. 53 (1983). Senator Cranston supported an amendment to this bill much like the judicial review provision later enacted in IRCA. He described it as providing a "very limited form of judicial review [that] would not expand the burden of the courts." Rather, "[i]t would be available only when an improper denial of legalization is raised as a defense in a deportation proceeding." 129 Cong. Rec. 12,810-12,811 (1983) (remarks of Sen. Cranston). That amendment was rejected. *Id.* at 12,837. Although both the Senate and the House passed immigration reform bills in the 98th Congress, their conflicting provisions were not reconciled and no final bill was enacted. The Senate bill that passed in the 99th Congress also precluded judicial review, but the House version containing the present language prevailed in conference. See note 12, *infra*.

fere with "the expeditious operation of the program for others." *Ibid.*[12]

Although the legislation ultimately enacted provided for limited judicial review, Congress did not intend to open the door to the kind of action brought here. As the House Committee Report explained, "[t]he bill provides for limited administrative and judicial review of denials of applications for legalization. * * * [T]he applicant can appeal a negative decision within the context of judicial review of a deportation order." The sectional analysis of the bill confirms that the provision governing review in the SAW program "[r]estricts judicial review to the context of review of an order of exclusion or deportation." H.R. Rep. No. 682, *supra*, Pt. 1, at 74, 99.

Given the size of the undertaking involved in the legalization programs, the restrictions on judicial review are "quite purposeful." *Ayuda*, 880 F.2d at 1330. According to Congressional Budget Office estimates in 1985, as many as 5.6 million undocumented aliens lived in the United States, and as many as 565,000 would apply for legalization. S. Rep. No. 132, *supra*, at 64. The legalization program was described as "a 'one-time-only' program to address a problem reulting from the large-scale illegal immigration of the past." *Id.* at 16. Although the magnitude and demands of the program were originally seen as warranting preclusion of all judicial review, the desire to insure fairness to applicants led to a compromise allowing limited review to individuals confronted with an order of deportation or exclusion. There is no

[12] The bill in question, which would have established a general legalization program, provided for "no * * * judicial review (by class action or otherwise) of a decision or determination under this section." S. 1200, 99th Cong., 1st Sess. § 202(f) (1985). Although S. 1200 passed the Senate, the House version, H.R. 3810, 99th Cong., 2d Sess. (1986), which provided for limited judicial review, was accepted in conference. See H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 92, 95-96 (1986) (noting the selection of the House legalization provisions without explanation and without reference to judicial review provisions).

evidence that, in effecting that compromise, Congress envisioned that district courts would have the power (and obligation) to supervise the processing of thousands of legalization applications under the aegis of reviewing a "pattern and practice" of INS conduct.[13]

B. Respondents' Complaint Challenges Determinations Respecting Applications For Adjustment Of Status, And Therefore Cannot Be Brought In This Action

The present action raises claims within the coverage of IRCA's jurisdictional provisions. Those claims can thus be advanced only in a statutory review proceeding, not in a district court class action by either the individual or the organizational respondents.

1. *The Individual Respondents.* The complaint alleged that the individual respondents (and the class they sought to represent) were denied SAW status because of alleged unlawful procedures employed by INS in adjudicating their applications. For example, the complaint asserted that INS imposed an improper burden of proof on SAW applicants; that INS denied SAW applicants the opportunity to present witnesses; that INS failed to furnish translators at government expense; and that INS provided defective notices of denial, hindering the ability of rejected SAW applicants to prosecute an administrative appeal. Compl. paras. 64, 80-82, 86; J.A. 38-39, 43-45. Each of these claims directly attacks the process used by INS to make a determination respecting entitlement to SAW status. Hence, they could all have been

[13] A bill recently introduced in the House would provide that "[n]othing in the provisions of [IRCA] * * * shall be construed—(1) as preventing judicial review" under the APA, 28 U.S.C. 1331, or 8 U.S.C. 1329 of "regulations, policies, and practices governing the adjustment of status under IRCA," or as preventing certain forms of relief from being granted. See H.R. 4300, 101st Cong., 2d Sess. § 322(a) (1990). The bill is pending before the House Committee on the Judiciary; we will, of course, inform the Court of any legislation affecting this case.

raised before INS's Administrative Appeals Unit (AAU), which provides administrative review of denials in the legalization programs. See 8 C.F.R. 103.3(a)(2), 210.2(f).[14] The same claims could then be raised on review of an exclusion or deportation order, *INS* v. *Chadha*, 462 U.S. at 938 ("the term 'final orders' in [Section 1105a]' includes all matters on which the validity of the final order is contingent'"); *Martinez-Montoya* v. *INS*, 904 F.2d 1018, 1019 & n.1 (5th Cir. 1990) (finding jurisdiction over a challenge to the denial of legalization in the context of reviewing a deportation order, and setting aside the AAU's denial); *Farrokhi* v. *INS*, 900 F.2d 697, 703-704 (4th Cir. 1990) (considering and rejecting an alien's legalization claim in the context of reviewing a deportation order).

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[14] Even if the AAU would not have had the authority to address respondents' constitutional claims, see *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); but see *Farrokhi* v. *INS*, 900 F.2d 697, 701 (4th Cir. 1990) ("Nothing appears to divest the BIA from hearing procedural due process claims that do not seek invalidation of congressional enactments."), individual aliens could, "throughout the statutory proceeding, raise and preserve any due process objection to * * * the procedure, and secure its full judicial review" as provided by IRCA. *Yakus*, 321 U.S. at 437.

Moreover, the AAU could be urged to afford commensurate relief on statutory grounds, thus eliminating the need for judicial intervention. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772-773 (1947). This consideration takes on particular force in light of respondents' contention that the procedural protections they seek are actually required by INS regulations (see Pet. App. 16a)—a contention well within the AAU's power to address. Alternatively, an alien might be found ineligible on grounds unrelated to the constitutional issue. See *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (the exhaustion requirement "assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions * * *."). But in this case, many of the individual respondents did not even pursue their claims beyond the legalization office or Regional Processing Facility levels. See Pet. App. 26a.

The individual respondents claimed to attack only "practices," "policies," and "procedures" independent of their particular cases—not any "determination[s] respecting" their applications for SAW status. Pet. App. 11a. But respondents cannot bypass IRCA through such a pleading device because the practices in question cannot be divorced from their impact on individual applications. Cf. *Heckler* v. *Ringer*, 466 U.S. 602 (1984). Indeed, if the complaint were characterized as challenging only an INS "practice," wholly apart from its concrete application in a particular case, the complaint would fail even to identify "agency action" that is amenable to judicial review under general principles of reviewability. The Court held a strikingly similar agency "program" to be unreviewable under the Administrative Procedure Act just last Term in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3172 (1990). As the Court explained in that case (slip op. 17-18):

> Respondent alleges that violation of the law is rampant within this program * * *. Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm.[15]

But respondents did not in fact limit their attack as they now contend. Rather, they specifically sought review of INS's practices as they affect individual application denials. The complaint described the "harm" suffered by the individual respondents as the denial of SAW status, Compl. para. 56; J.A. 36, and it sought (in addition to prospective changes in INS procedures) an order

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[15] See also *Perales* v. *Casillas*, 903 F.2d 1043, 1053 (5th Cir. 1990) ("The district court's fundamental error is the attempt to issue a class-wide restraint on the basis of a quintessentially individual problem.").

requiring INS "to set aside all denials of SAW applications filed by Plaintiffs and members of the class they seek to represent who are subject to the practices, policies, and procedures addressed in this complaint," and "to reconsider all [such] SAW applications." Compl., Prayer for Relief, paras. D(8)-D(9); J.A. 48. Likewise, the district court ordered INS to vacate some notices of denial, to reconsider other denials, and to afford still other applicants new opportunities to submit evidence. Pet. App. 56a.

Such individualized relief makes manifest that the complaint's purpose was to achieve, on a mass scale, review and reversal of INS's denials of SAW applications in particular cases, and to do so free from the constraints expressly imposed by Congress. That reading of the complaint is no less accurate simply because respondents stopped short of asking that any applicant actually be granted SAW status by the court. The complaint simply combined many individual procedural claims, none of which was cognizable individually in district court, into one composite claim. But claims that are jurisdictionally barred individually cannot be salvaged by combining them into a class action. Cf. *Snyder* v. *Harris*, 394 U.S. 332 (1969) (in a class action founded on diversity jurisdiction, aggregation of claims is not permitted for purposes of satisfying the jurisdictional-amount requirement).

In short, the specific claims raised in the complaint that have "been reduced to more manageable proportions, and [their] factual components fleshed out, by some concrete [agency] action," *Lujan*, slip op. 17, are not reviewable in this proceeding—which, in essence, seeks review of INS's initial or final denials of many individual applications. Respondents' claims attack integral parts of the process of making a "determination respecting an application"; to allow such matters to be isolated for wholesale challenge—outside the context of individual deportation or exclusion orders—runs counter to the expressed intent of Congress.

In a closely analogous context, this Court has rejected arguments that individual plaintiffs can bypass restrictions on judicial review by purporting to attack general policies rather than individual results. *Heckler* v. *Ringer*, 466 U.S. 602 (1984). The plaintiffs in *Ringer* contended that their lawsuits (challenging the refusal by Secretary of Health and Human Services to reimburse Medicare claimants for a particular form of surgery) were permissible without waiting for the Secretary's final decision on their benefits claims, because they challenged only the Secretary's " 'procedure' for reaching her decision," not the underlying decision on their particular claims. 466 U.S. at 614. This Court rejected the purported distinction, explaining that "it makes no sense to construe the claims * * * as anything more than, at bottom, a claim that they should be paid for their * * * surgery." *Ibid.* Explaining that the procedural challenges were "inextricably intertwined" with the underlying benefits claims, the Court concluded that "all aspects of respondents' claim for benefits should be channeled first into the administrative process which Congress has provided for the determination of claims for benefits." *Ibid.* The Court expressly rejected the contention —also urged by the respondents here—that "simply because a claim somehow can be construed as 'procedural,' it is cognizable in federal district court by way of federal-question jurisdiction." *Ibid.*[16]

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[16] Respondents have suggested (Br. in Opp. 13 & n.9) that *Heckler* v. *Ringer* can be distinguished because that case construed the language in the Medicare Act restricting review of "any claim arising under" that Act (42 U.S.C. 405(h)), while this case involves the language in IRCA restricting review of "a determination respecting an application" (8 U.S.C. 1160(e)(1)). But as with the "claim arising under" language considered in *Ringer*, a "determination respecting" an application cannot be confined to the final decision on the particular claim; rather, it quite naturally encompasses the myriad of subsidiary procedural "determinations" that lead up to the ultimate decision on an application. Cf. *Foti* v. *INS*, 375 U.S. at 229 (the term "final order of deportation" includes "all

Because the courts have jurisdiction to hear respondents' claims in reviewing deportation or exclusion orders, the denial of district court review does not raise "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). Indeed, no heightened showing of congressional intent is required to conclude that general district court review is unavailable for individual applicants under IRCA. Cf. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967); *United States* v. *Fausto*, 484 U.S. at 452. Review in this case is not foreclosed; it is simply directed to another forum. Cf. *Florida Power & Light Co.* v. *Lorion*, *supra* (resolving the question whether review was available in district court or court of appeals without discussing the presumption against preclusion of review). For that reason, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), is inapposite. There, the Court held that notwithstanding provisions barring all judicial review of individual Medicare Part B *claims*, a district court challenge to *regulations* under Part B was permissible. But that holding was necessary to avoid a total preclusion of judicial review of those regulations, 476 U.S. at 670-676, a conclusion that would have raised a "serious constitutional question." *Id.* at 681 n. 12. That consideration has no bearing on the proper construction of IRCA.[17]

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determinations made during and incident to the administrative proceeding").

[17] Nor is this case like *UAW* v. *Brock*, 477 U.S. 274 (1986), where the Court upheld the ability of a union (on behalf of its members) to challenge the Department of Labor's guidelines governing a special federal unemployment benefits scheme. The applicable statute, the Trade Act of 1974, 19 U.S.C. 2101 *et seq.*, provided that benefits determinations were to be made by a cooperating state agency, and that such determinations were subject to judicial review only as provided under state law. The Court held that a federal court challenge to the Department of Labor's *guidelines* was permissible because the challenge did not seek benefits for any

2. *The Organizational Respondents.* The court of appeals compounded its error by upholding the district court's jurisdiction over the claims of the organizational respondents. MRS predicated its right to sue on its status as a "qualified designated entity," which the statute charged with assisting applicants. It claimed that INS's conduct discouraged eligible applicants from filing applications and thereby prevented MRS from performing its mission under IRCA. HRC simply claimed injury to itself because of an impairment of its ability to assist its members and the diversion of its resources. Compl. paras. 17-18; J.A. 23-24; Pet. App. 41a.[18]

Organizations such as MRS and HRC, of course, cannot themselves obtain review of the operation of the SAW program by raising claims on review of an order of deportation or exclusion. But far from suggesting that these organizations are free to bring district court challenges to substantive or procedural aspects of the SAW program (unencumbered by the need to exhaust administrative remedies), the absence of a provision giving these parties judicial recourse suggests that Congress did not intend to authorize such challenges at all. As explained above,

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particular claimant. 477 U.S. at 284-285. But that holding flowed from the quite different language restricting judicial review in the Trade Act, which applied only to "determination[s] by a cooperating *State* agency"—not to determinations by the Labor Department such as its program-wide guidelines. 19 U.S.C. 2311(d) (emphasis added). No such division of responsibilities between different sovereigns, or even different agencies, exists here. Moreover, the holding in *Brock* was necessary to assure some federal forum for initial review of the Department of Labor's substantive rules. As we have pointed out, district court jurisdiction is not needed for that purpose under IRCA.

[18] HRC also claimed indirect injury because of adverse effects on its membership. Compl. para. 17; J.A. 23. But any such claim of representative standing depends on a showing that the members themselves could sue "in their own right." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Because individual SAW applicants may not circumvent IRCA's judicial review provisions by commencing an action in district court, the organizations cannot sue as their representatives.

the matters raised in the complaint that are reviewable under IRCA are matters integral to the determination of individual applications, and the Act precludes *all* judicial review with respect to such matters—not just review at the instance of an applicant—except in a challenge to an order of deportation or exclusion. Thus, review at the instance of respondent organizations is not available.

"[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Although there is ordinarily a presumption favoring judicial review, it is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351, quoting *Association of Data Processing Service Organizations, Inc.*, v. *Camp*, 397 U.S. 150, 157 (1970). See also *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). In *Block*, this Court applied those principles in rejecting a claim that consumers could challenge administrative milk-handling orders free from the exhaustion requirements applicable to milk producers and handlers, the parties subject to those orders. The absence of any express provision for consumers to mount such challenges, the detailed scheme governing challenges by other parties, and the overlap of the consumers' interest with that of other parties strongly indicated that Congress had not intended to permit judicial review at the instance of consumers. The same principles are even more clearly applicable here in light of the explicit statutory limitation of judicial review.

Although Congress provided for qualified designated entities in order to encourage aliens to come forward and apply for legalization, it did not designate those entities as "litigating ombudsmen" for aliens. *Ayuda*, 880 F.2d at 1339. Congress's careful description of the functions of a qualified designated entity—a description that does

not include authorization to sue—constitutes powerful evidence that no such role was intended. Cf. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). Nor, of course, did Congress identify any role under IRCA for a group like HRC, which simply seeks to assist Haitian refugees. Those omissions counsel against the recognition of a right for these groups to litigate claims belonging to individual applicants, for whom an opportunity for judicial review is provided.

It is not simply IRCA's omission of authorization to sue that compels the denial of the organizations' claims. Permitting such actions does appreciable damage to IRCA's express design for judicial review. Without administrative appeals by individual applicants, the agency cannot complete its formulation of policy, determine whether the alleged errors warrant reversal on statutory grounds, or assess whether any procedural errors are harmless. It clearly undermines Congress's deliberate choice of case-by-case review to accord organizational plaintiffs immediate and unrestricted access to the courts under the SAW program. Moreover, since these organizations are not the intended beneficiaries of the SAW program, it is hard to imagine that Congress meant to confer upon them such unique litigation advantages. These advantages would be especially inappropriate when, as here, their legal claims essentially duplicate the legal claims of applicants, so that "no statutory interest is left unprotected by recognizing Congress' implicit preclusion of suits" by such organizations. *Ayuda*, 880 F.2d at 1340.[19] In light of those factors, preclusion of the

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[19] Respondents have insisted (Br. in Opp. 15) that they are entitled to sue because they have experienced a distinctive injury: the impaired ability to counsel their members. The nature of the *injury*, however, is not relevant to the inquiry under *Block*; that case directs attention to the nature of the legal *issues* asserted. See *Block*, 467 U.S. at 349. Indeed, just like respondents here, the consumers in *Block* claimed a distinctive injury; the Court nevertheless rejected their claim because it would "disrupt" the statutory scheme to allow consumers to assert in court "precisely the same

organizations' claims is "fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351.

Contrary to the court of appeals' apparent view, the question is not whether HRC and MRS might have alleged injury-in-fact for standing purposes under Article III. See Pet. App. 11a n.10, citing *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 378-379 (1982) (holding that an organization's impaired ability to counsel its members satisfies the Article III requirement of injury-in-fact). IRCA's detailed provisions manifest a far more restrictive approach to judicial review than the constitutional minimum examined in *Havens Realty*. And, as "congressional preclusion of judicial review is in effect jurisdictional," *Block*, 467 U.S. at 353 n.4, the conclusion that Congress did not intend to authorize suit by the organizational plaintiffs means that the district court was without subject matter jurisdiction to hear that complaint.

C. No Jurisdictional Exception Exists Under IRCA For Actions Alleging A "Pattern And Practice" of Misconduct

In rejecting petitioners' jurisdictional arguments, the court of appeals never analyzed the structure of IRCA or the language used by Congress in limiting judicial review. Instead, the court relied on two court of appeals precedents under the general immigration laws that purportedly created a "pattern and practice" exception to 8 U.S.C. 1105a. Pet. App. 9a-11a, citing *HRC* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*. While those cases, in our view, are wrongly decided, they are in any event not controlling here. Neither case involved the distinctive statutory framework governing judicial review under IRCA. Moreover, importing the "pattern and practice"

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exceptions" that handlers must assert administratively. *Id.* at 348. Here also, it disrupts IRCA's system for review to allow the organizations to litigate the applicants' due process claims.

exception into IRCA produces consequences demonstrably at odds with Congress's intention to assign primary responsibility for implementation of IRCA to the Attorney General, not the courts.

1. a. The leading "pattern and practice" case is *HRC* v. *Smith*. There, a class action was filed on behalf of over 4,000 Haitians who claimed that INS was improperly expediting their asylum claims in violation of their statutory and constitutional rights. INS contended that Section 1105a, which governs judicial review of all final orders of deportation and determinations incident thereto (including asylum claims), precluded the assertion of the plaintiffs' claims in district court. 676 F.2d at 1032. Although finding INS's argument to have "surface appeal," the Fifth Circuit rejected it, asserting that an INS "pattern and practice" of violating the constitutional rights of aliens raised a "separate matter" from any individual case, and was "independently cognizable in the district court under its federal question jurisdiction." *Id.* at 1033.

The Eleventh Circuit extended the holding of *HRC* to statutory "pattern" claims in *Jean* v. *Nelson*. A class of Haitian refugees who were in the midst of exclusion proceedings sued in district court claiming that they had been denied notice of their right to apply for asylum. Although Section 1105a requires exhaustion of remedies and permits aliens to challenge only final orders of exclusion, the court concluded that those restrictions were not applicable. The court drew the same distinction marked out in *HRC* between "an individual challenge on a preliminary procedural matter," which was barred by Section 1105a, and "allegations of widespread abuses by immigration officials," which could be heard in district court under 28 U.S.C. 1331. 727 F.2d at 980 & n.32. In the latter instance, the court said, because the legal issues affect "an entire class of aliens," the purposes of postponing judicial review until after the entry of individual

final orders (the avoidance of delay and "procedural redundancy") would not be served. *Ibid.*[20]

In our view, both *HRC* and *Jean* go astray in announcing that the district courts have power to adjudicate class action "pattern and practice" claims that Congress has said may be heard only in individual cases, in another forum or at another time. Moreover, their departure from correct principles of reviewability is made clearer by this court's decision in *Lujan*, discussed at p. 19, *supra*.

The jurisdiction of the lower federal courts is governed by statute. *Finley* v. *United States*, 109 S. Ct. 2003, 2006 (1989); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another * * *."). District courts cannot assume the power to hear cases simply because it may seem wise, efficient, or prudent to do so. While *HRC* asserted that district courts may draw upon their "equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged," 676 F.2d at 1033, and *Jean* extended that principle to statutory claims, 727 F.2d at 980 n.32, "it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *INS*

[20] This Court ultimately affirmed the judgment in *Jean* v. *Nelson*, *supra*, on other grounds, without discussing the jurisdictional issue. The question presented by the petition in *Jean* was whether unadmitted aliens could invoke the equal protection guarantee of the Fifth Amendment's Due Process Clause. This Court, in affirming, did not reach that question because it found that nonconstitutional grounds for decision should be considered further on remand. *Jean* v. *Nelson*, 472 U.S. at 853-857. Since neither the parties nor the Court addressed the jurisdictional issue, the decision cannot be understood to constitute endorsement of the theory espoused by the lower court. See *Hagans* v. *Levine*, 415 U.S. 528, 535 n.5 (1974); cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1064-1065 (1990).

v. *Pangilinan*, 486 U.S. 875, 883 (1988). *HRC* and *Jean* advance various policy reasons for short-circuiting the scheme for judicial review reflected in Section 1105a, but "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 311 (1989).[21]

b. Even if the *HRC-Jean* approach to Section 1105a were accepted, there would still be no warrant for extending that approach to IRCA. In IRCA, Congress not only incorporated the provisions of Section 1105a, but also expressly limited judicial review of a "determination respecting an application" under the SAW program to a petition for review of an order of deportation or exclusion. As the D.C. Circuit has recognized, "whatever the proper interpretation of [Section 1105a] as it relates to 'final orders of deportation,' IRCA's judicial review provisions, although employing the [Section 1105a] machinery, have a broader preclusive effect." *Ayuda*, 880 F.2d at 1337. Consequently, if there had been any doubt about the result under Section 1105a standing by itself, Congress removed it. The sole source of judicial power to review determinations respecting SAW applications is found in 8 U.S.C. 1160(e). If that section does not afford a basis for review—and it clearly does not authorize

[21] The "pattern and practice" exception is particularly unmanageable because it contains no clearly delineated boundaries. The common theme of the cases applying it seems to be only a feeling that the judiciary must "get involved" to rectify some perceived immigration problem. This, to say the least, is not a workable limiting principle. Thus, "[a]lthough the Fifth Circuit emphasized the narrowness of its holding and promised not to condone any 'end-run around the administrative process,' the application of *HRC* v. *Smith* has proliferated to the point where it now more nearly resembles a gaping hole in the middle of the INS's defensive line." *Ayuda*, 880 F.2d at 1336 (citation omitted).

sweeping district court actions not involving a challenge to a deportation or exclusion order—a district court case must be dismissed for want of judicial power.

2. The conclusion that Congress did not intend to sanction a "pattern and practice" exception under IRCA is further supported by experience. The propensity of a pattern and practice exception is not only to encourage wholesale challenges to agency programs but also to draw courts into day-to-day supervision of the activities of agency officials. Litigation under IRCA has repeatedly demonstrated that detailed judicial oversight is a nearly inevitable consequence of district court jurisdiction. Given the generally narrow scope of judicial review applied to immigration matters, that phenomenon is, beyond question, not what Congress had in mind.

This case—where the district court commanded the reopening of more than 20,000 SAW applications, ordered the hiring of translators in various languages, and dictated the fashion in which INS interviewers had to make a record of proceedings—illustrates the way in which the jurisdictional exception for "pattern" cases tends to mushroom into full-scale management of INS's functions. And this case does not stand alone. The *Ayuda* litigation in the D.C. Circuit,[22] in which the plaintiffs relied on the same jurisdictional theory as that advanced here, began as a challenge to a particular INS regulation under IRCA, but quickly metamorphosed into series of supplemental orders interpreting, applying, and expanding the original ruling "as if [the district court] were the administrator of the program." *Ayuda*, 880 F.2d at 1342. Ultimately, the government successfully appealed from one of the court's orders, but even while the appeal was pending, litigation proceeded apace in the district court,

[22] See *Ayuda, Inc.* v. *Meese*, 687 F. Supp. 650 and 700 F. Supp. 49 (D.D.C. 1988), rev'd in part, 880 F.2d 1325 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018. The facts are more fully set forth in the government's brief in response to the petition for certiorari (a copy of which has been provided to respondents here).

generating a half-dozen new orders directed at INS.[23] Other district courts have wielded their "pattern and practice" jurisdiction to extend the deadline for aliens to apply for legalization, despite Congress's express provision for a one-year application window.[24] The district courts' actions in these cases cannot be fairly described as judicial "review." Rather, by restructing major aspects of the legalization programs, these actions have shifted to the judiciary a variety of policy and administrative decisions that Congress entrusted to the Attorney General.

This result is particularly inappropriate in light of the paramount role of the political branches in immigration matters. See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972). This Court has long held that the essentially political nature of immigration matters requires a correspondingly lim-

[23] Among these was an order appointing a Special Master to find facts and recommend what relief, if any, would be appropriate for aliens who failed to file a timely application for legalization because of the regulation invalidated by the district court. Because of the potential burden of such proceedings, the government challenged the appointment of a Special Master by petitioning for mandamus, but the D.C. Circuit denied the petition. *In re Thornburgh*, 869 F.2d 1503 (1989).

[24] See *Catholic Social Services, Inc.* v. *Thornburgh*, No. S-86-1343-LKK (E.D. Cal. June 10, 1988), appeals pending, Nos. 88-15046, 88-15127 and 88-15128 (9th Cir. argued Nov. 18, 1988); *LULAC* v. *INS*, No. 87-4757-WDK (C.D. Cal. 1988), appeal pending, No. 88-15046 (9th Cir.). Although the Ninth Circuit expedited briefing and argument in these cases, no decisions have issued, and, on June 28, 1990, the panel issued an order, sua sponte, that withdrew and deferred submission of these cases pending this Court's decision in the instant case. In the meantime, under the terms of stays entered in these cases, INS has been compelled to accept legalization applications, grant work authorization, and withhold deportation to class members for nearly two years—despite Congress's intention to create a one-year program. 8 U.S.C. 1255a(a)(1)(A), 1255a(f)(2). Over 70,000 aliens have filed applications under the terms of the stays. Compliance with these stays has proved to be a major logistical and financial strain for INS.

ited role for the courts. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); *The Japanese Immigrant Case*, 189 U.S. 86, 97 (1903). As the Court explained in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Id.* at 81-82 (footnote omitted); *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). The courts, of course, have the ultimate responsibility to declare the due process rights of aliens who have "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982).[25] But nothing in this Court's jurisprudence indicates that judicial intervention to adjudicate those rights should preempt the mechanisms Congress established for that purpose. In an area as sensitive as the administration of a massive legalization program involving millions of aliens, courts should be particularly hesitant to depart from the case-by-case method of review that Congress provided. In this case, a correct reading of IRCA compels the conclusion that the exercise of judicial power sanctioned by the court of appeals was unwarranted.

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[25] Even in discharging that task, the Court has emphasized that "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature. * * * The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Landon* v. *Plasencia*, 459 U.S. at 34-35.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1105a provides in pertinent part:

Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 1252(b) of this title or comparable provisions of any prior Act, except that—

* * * * *

(9) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made * * * under the provision of section 1226 of this title * * * may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the

administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

8 U.S.C. 1160 provides in pertinent part:

Special agricultural workers

(a) Lawful residence

(1) In general

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien meets the following requirements:

(A) Application period

The alien must apply for such adjustment during the 18-month period beginning on the first day of the seventh month that begins after November 6, 1986.

(B) Performance of seasonal agricultural services and residence in the United States

The alien must establish that he has—

(i) resided in the United States, and

(ii) performed seasonal agricultural services in the United States for at least 90 man-days,

during the 12-month period ending on May 1, 1986. For purposes of the previous sentence, performance of seasonal agricultural services in the United States for more than one employer on any one day shall be counted as performance of services for only 1 man-day.

(C) Admissible as immigrant

The alien must establish that he is admissible to the United States as an immigrant, except as otherwise provided under subsection (c)(2) of this section.

* * * * *

(e) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide a single level of administrative appellate review of such a determination.

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(3) Judicial review

(A) Limitation to review of exclusion or deportation

There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under Section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

8 U.S.C. 1329 provides:

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under Section 1325 or 1326 of this title may be apprehended. No suit or proceeding for a violation of any of the provisions of this subchapter shall be settled, compromised, or discontinue without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.

28 U.S.C. 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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GENE McNARY, Commissioner of Immigration and Naturalization Service, et al.,

Petitioners,

vs.

HAITIAN REFUGEE CENTER, INC., et al.,

Respondents.

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Whether the district courts are wholly precluded by 8 U.S.C. § 1160(e) from asserting general federal question jurisdiction, 28 U.S.C. § 1331, or statutory immigration jurisdiction over matters arising under Title II of the Immigration and Nationality Act, 8 U.S.C. § 1329, by 8 U.S.C. § 1160(e), where organizational, as well as individual plaintiffs, challenge the constitutionality of INS practices and policies that make meaningful individual review impossible.

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STATEMENT OF THE CASE

By enacting the Immigration Reform and Control Act of 1986, Congress addressed the persistent problems of a uniquely vulnerable and perenially exploited group by creating an amnesty program for alien farmworkers in the United States. The question presented by this case is whether the district courts are wholly precluded from exercising their general federal question jurisdiction under 28 U.S.C § 1331 or their statutory immigration jurisdiction under 8 U.S.C. § 1329 to hear a case that does not seek review of the determination of any amnesty application, but instead raises a constitutional challenge to INS practices and policies which frustrate the Congressional goal of a generous amnesty program and deny individual applicants a meaningful opportunity to be heard.

A. The Special Agricultural Worker Program

As part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, Congress required that the Attorney General grant residency under a Special Agricultural Worker ("SAW") program to alien farmworkers who performed seasonal agricultural services and who otherwise qualified under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1160 *et seq*. Congress heard extensive testimony on the effect that employer sanctions would have in removing a substantial number of undocumented individuals from the agricultural work force. The program was designed to respond to the growers' concerns regarding the availability of labor and "at the same time to protect workers to the fullest extent of all applicable federal, state and local laws . . . to provide them with a status that ensures that their employment is fully governed by all relevant law without exception." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt.1, 83-84 (1986).

Under the SAW program a farmworker was eligible to become a temporary resident if he or she (1) resided in the United States and performed seasonal agricultural services for at least ninety (90) man-days during the twelve (12) month

period ending on May 1, 1986 and (2) was admissible as an immigrant. 8 U.S.C. § 1160(a)(1)(B). To be eligible for the program, the SAW applicant had to apply for adjustment of status to temporary residency during the eighteen (18) month period beginning on June 1, 1987. 8 U.S.C. § 1160(a)(1)(A). The application period expired on November 30, 1988.

Congress specifically recognized that farmworkers would have a difficult time in establishing their eligibility for SAW status given the "unique documentation of work history problems in agriculture." H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 97 (1986). The lack of pay records for agricultural employees, resulting from small employer exemptions from wage and hour laws, as well as from employment by farm labor contractors or others whose record keeping practices were deficient, led Congress to conclude that "fairness dictates they create a presumption in favor of worker evidence, unless disputed by specific evidence adduced by the Attorney General." *Id.*

Congress also recognized that potential applicants for legalization in general were members of a "fearful and clearly exploitable" subclass within American society, S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985), naturally wary of government authority. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt.1, 49 (1986). Congress heard extensive testimony that legalization applicants would have great hesitation in submitting applications because they were fearful that the applicants would not be approved and that they would be arrested and deported. *See, e.g., Immigration Reform and Control Act Hearings on H.R. 1510 Before The Subcommittee On Immigration, Refugees and International Law Of The House Committee On The Judiciary*, 98th Cong., 1st Sess. 783, 789 (1983) (statement of Dale DeHaan, American Council for Volunteer Agencies); *id.* at 844-45, 855-56 (statement of John Huerta, Mexican American Legal Defense and Education Fund).

Because the failure of a significant number of alien farmworkers to submit applications would defeat the purpose of the legislation, Congress shaped the statutory scheme to encourage farmworkers to come "out of the shadows" and

submit applications. First, Congress directed the Attorney General to "designate qualified voluntary organizations and other qualified State, local, community, farm labor organizations, and associations of agricultural employers," to receive applications directly from farmworkers. INA § 210(b)(2), 8 U.S.C. § 1160(b)(2). These "qualified designated entities" ("QDEs") would reach out to the alien community to encourage, counsel and assist them in applying for legalization. In order to insure that farmworkers would come forward without penalty, Congress, in effect, erected a wall of confidentiality between the QDEs and the Attorney General. The QDEs could only forward applications to the Attorney General where the applicant had consented to it.

Congress also prohibited, by statute, the Attorney General and the Immigration and Naturalization Service ("INS") from having access to the files and records of the QDE that related to a farmworker "without the consent of the alien." INA § 210(b)(4), (5), 8 U.S.C. § 1160(b)(4), (5). With these mechanisms in place, Congress hoped "that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward . . . The confidentiality of the records [of QDEs] is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 73 (1986). *See also*, S. Rep. No. 132, 99th Cong., 1st Sess. 47 (1985) (the QDE provision is aimed "to assure applicants that they may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization").

In short, by providing a network of QDEs, "Congress meant to permit aliens unsure of their status to step forward *tentatively*, obtain accurate and confidential advice about legalization, and *only then* decide whether to submit an application to the INS." *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1356 (D.C. Cir. 1989) (Wald, J., dissenting).

Second, Congress erected an additional wall of confidentiality. It prohibited, under criminal penalty, the Attorney General, and any other official employee of the Department of Justice, including INS officials, from using any information contained in a SAW application for enforcement purposes, including the initiation of deportation proceedings. INA § 210(b)(6), 8 U.S.C. § 1160(b)(6). The confidentiality provision insured that if an application was denied, INS could not initiate deportation proceedings based on the information obtained in the application. If INS wished to initiate deportation proceedings, it could only do so *if* it obtained information through an independent source as to the farmworker's unlawful status.

Third, Congress sought to encourage farmworkers to submit applications by providing work authorization upon the submission of a "nonfrivolous application" for SAW status which they would maintain during the course of their application process. INA § 210(d)(2), 8 U.S.C. § 1160(d)(2).

B. The Application Process

The application process for the SAW program began at a personal interview held at a legalization office ("LO"), a local office of the INS authorized to accept and process applications. 8 C.F.R § 210.1(i) (1990).[1] The interviewing office could deny the application, recommend that it be denied, or recommend that it be granted. Those applications that were not denied by the interviewing officer were forwarded to a regional processing facility ("RPF") for adjudication. If a denial issued either from the LO or the RPF, the applicant had to appeal the decision to the legalization appeals unit ("LAU") which would make the final administrative decision on SAW applications. Petitioners' Appendix ("Pet. App.") 22a. Subsequent to the final administrative decision by the LAU, an applicant could seek review in a federal court of appeals only as part of the review of a final order

[1] Regulations to implement the SAW provisions are codified at 8 C.F.R. §§ 103 and 210. 52 Fed. Reg. 16,190 *et seq.* and 16,195 *et seq.* (May 1, 1987).

of deportation or exclusion thereby requiring the applicant to have undergone such deportation or exclusion proceeding. 8 U.S.C. § 1160(e)(3).

The interview process was central to the determination of SAW status. The immigration officer at the LO was asked to determine the credibility of the applicant and the documentation he or she presented regarding eligibility. 8 C.F.R. §§ 210.2(c)(4)(i) (the applicant must establish to the satisfaction of the examining officer during an interview that his or her claim to eligibility for special agricultural worker classification was credible); and 210.3(b)(2) (the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility). Moreover, the personal interview was of utmost importance because, as the district court found, "farm labor contractors and other agricultural employers often do not maintain accurate employment records. [T]his makes it difficult and, in many cases, impossible for a farmworker to produce formal documentation. Farmworkers are likely to be paid in cash by farm labor contractors whose lists of workers are often incomplete." Pet. App. 28a-29a.[2]

The interview is "the only face-to-face encounter between the applicant and the INS allowing the INS to assess the applicant's credibility." Pet. App. 28a. Because the INS did not record or prepare a transcript of the interview, the only record created in the case was established on the INS officer's worksheet, Form I-696. Pet. App. 28a. The record created by the INS officer on the I-696 was of paramount importance because the administrative appeal to the LAU was

[2] In passing the SAW legislation, Congress was fully aware of the documentation problem. Congress utilized the standards employed in the Fair Labor Standards Act and granted a presumption to SAW applicants recognizing that there may be "employee loss of records, destruction or falsification of records by employers, and other difficult circumstances where precise evidence of hours worked is lacking. H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 97 (1986). IRCA formalized the presumption in favor of applicants. 8 U.S.C. § 1160(b)(3)(B)(iii).

to "be based solely on the administrative record established at the time of the determination on the application" unless there was newly discovered evidence. 8 U.S.C. § 1160(e)(2)(B).

Similarly, judicial review of an individual denial was to "be based solely upon the administrative record established at the time of the review of the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U.S.C. § 1160(e)(3)(B). Thus, under petitioners' procedure, the personal interview at the LO was the only opportunity to present testimony. The interviewer's notes on the I-696, together with whatever written documentation was submitted, constituted the "record" which was to be the "sole" basis for review by the RPF, the LAU and ultimately, the circuit court. Pet. App. 7a, 28a; 8 U.S.C. §§ 1160(e)(2)(B), (e)(3)(B).[3]

C. The Proceedings In The District Court

This action was filed on June 13, 1988 by the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach ("MRS"), a qualified designated entity, the Haitian Refugee Center, Inc. ("HRC"), a nonprofit membership organization which provides legal representation to Haitian refugees, "including Haitians who are seeking benefits under IRCA's SAW program," Joint Appendix ("J.A.") 23, as well as a class of SAW applicants which included farmworkers who had not yet applied under the program, but who would be denied SAW status "because of the Defendants' unlawful policies and practices." J.A. 34-35.

The Plaintiffs' complaint sought declaratory, mandatory and injunctive relief to prevent their continued injury as a

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[3] The applicant for SAW status has no opportunity to reopen the proceedings once the "record" is established on the I-696 by the legalization officer. 8 C.F.R. § 103.5 ("motions to reopen a proceeding or reconsider a decision under part 210 . . . of this chapter shall not be considered").

result of the "unlawful practices and polices" of the INS that "imposed an interview procedure which violates the applicants' Fifth Amendment right to due process by failing to provide interpreters, failing to allow the applicants to rebut adverse evidence, and refusing to allow the applicants to present witnesses on their own behalf." Pet. App. 19a-20a.[4]

The preliminary injunction hearing produced evidence that demonstrated the existence of policies and practices of INS at the SAW interview that would unconstitutionally deprive farmworkers of a "meaningful" opportunity to be heard. Pet. App. 50a. The evidence revealed that under its policies and practices INS did not record or prepare a transcript of the interview. Pet. App. 7a, 28a, J.A. 61-62 (stipulation of counsel). In addition, the worksheets used by INS officers to take notes on the interview (I-696) often contained "very little information about the interview" and sometimes, "were completely blank." Pet. App. 8a. As the court of appeals noted, "without any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. 16a. The injunctive relief sought and obtained merely required INS interviewers "to particularize the evidence offered, testimony taken, credibility determinations and any other relevant information on the form I-696" so that a record for review would be available. Pet. App. 57a.

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[4] The plaintiffs also brought other challenges to INS's policies and practices, including the petitioners' reliance on an impermissible standard of proof. As the petitioners acknowledge, they "did not challenge those paragraphs of the preliminary injunction on appeal." Petitioners' Brief ("Pet. Br.") at 7 n.5. Notwithstanding petitioners' claim that they continue to appeal the jurisdictional issue with respect to the first five paragraphs of the lower court's injunction, their brief to the court of appeals sought appeal only as to issues relating to the interview process. Appellants' Opening Brief at 16 n.3 ("defendants/appellants have advised plaintiffs . . . that INS would fully comply with the terms of paragraphs one through five of the injunction which will eventually render moot the first through fifth claims of the complaint"). Indeed, the INS did seek to render these issues moot on August 26, 1988 by issuing a cable requiring the legalization offices in the Eleventh Circuit to utilize new procedures.

The evidence also revealed that although ninety percent (90%) of the applicants at the legalization office spoke either Spanish or Haitian Creole, Pet. App. 9a, under its policies and practices, "the INS d[id] not provide interpreters . . . at the interview for applicants for Special Agricultural Worker (SAW) status," J.A. 61-62, and the LO where a significant number of Haitians applied "never had an employee who spoke Creole." J.A. 61-62. Cultural differences and the poor quality of the translations created a great potential for misunderstanding and confusion as to the applicant's testimony. Record ("R.") at First Supplement ("1st Supp."), Vol. 1, pp.9-10; R. at 2d Supp., Vol. 2 pp.41, 89. The "record" of the interview for appeal "neither identified the name of the interpreter nor indicate[d] whether an interpreter was used." Pet. App. 9a, 27a-28a. These errors were, as a practical matter, insulated from correction because the INS did not make the I-696 available for inspection by applicants except pursuant to a request under the Freedom of Information Act. J.A. 62.

Evidence was also presented regarding the lack of an opportunity to present witnesses at the LO. Although INS' treatment of the applications "enhance[d] the importance of live witnesses to the application process," in practice, "applicants had been prevented from presenting witnesses . . . [and] some LOs disallowed witness testimony as a general rule." Pet. App. 8a-9a.

At the preliminary injunction hearing, INS officials disclosed for the first time that they had compiled lists of individuals who were suspected of being involved in fraud or whose names were suspected of having been fraudulently used by others. These lists, which included the names of hundreds of crewleaders, growers, bookkeepers, immigration agencies and attorneys, were never made part of the record and were never made available to applicants within the administrative review process.[5] Applications submitted

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[5] Respondents admit that the individuals listed were not necessarily involved in fraud at all and that many were legitimate farm labor contractors

(Continued on following page)

containing these names were subjected to a stricter level of scrutiny than other applications. Indeed, the director of the RPF conceded the existence of a practice under which, if the name of an affiant appeared on the list, the affidavit would not be considered credible and the application would be denied on that basis alone. R. at 2d Supp. Vol. 4, p.88 (testimony of William Chambers). The head of one LO could not recall any instance in which an application was approved where it was accompanied only by an affidavit and involved a name on the list. R. at 1st Supp. Vol. 4, p.47 (testimony of John Adamczyk). Under this practice, applicants were not advised of the existence of these secret lists, nor given any opportunity to correct errors. R. at 1st Supp. Vol. 4, p.121; R. at 2d Supp. Vol. 4, p.92.

The evidence indicated that as a result of these practices and policies adopted for processing SAW applications, the denial rate for SAW applicants filed in the State of Florida was approximately twenty-nine percent (29%), almost six (6) times the denial rate for applications filed for amnesty under IRCA § 245A. Pet. App. 27a at n.9. As a result of these practices and policies documented at the hearing, the district court concluded that "it is difficult to find that the above circumstances constituted a 'meaningful' opportunity to be heard." Pet. App. 51a.

D. The Effect of INS' Practices On Class Members And The Organizational Plaintiffs

The impact of the petitioners' unconstitutional practices both on class members who had not yet filed applications and on those who had was devastating. Father Frank O'Loughlin, Migration and Refugee Services Director for the Diocese of

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(Continued from previous page)

who did employ farmworkers during the relevant time period. R. at 1st Supp. Vol. 4, p.35. The list used by the LOs was compiled following a telephone request from the assistant district director to the various LOs for a list of people who were "suspect." No backup documentation exists which supports the inclusion of a name on this list. R. at 1st Supp. Vol. 4, pp.35-36.

Palm Beach, testified that one recent study in Florida on the nutritional status of farmworkers concluded that farmworkers without work authorization "are essentially being starved out . . . " R. at 2d Supp. Vol. 2, p.151. He further testified that:

> [T]he farmworker who is out of work is out of everything. If he is in crew bosses housing, the crew boss has no further use for him. So now he is evicted. Farmworkers are paid on a daily basis or almost a daily basis. They don't have a reserve to fall back on. If they are not getting the daily pay, then they are immediately in financial trouble. Their relationship to their employer is one of utter dependency and powerlessness basically. Once the string is cut, once the crew boss says we don't need you, they have absolutely nowhere to return except back to [the Diocese].

R. at 2d Supp. Vol. 2, p.122. As a result of these practices, the court concluded that class members would suffer irreparable harm "because they will be denied the ability to earn a living and to support their families . . . " Pet. App. 55a.

The organizational plaintiffs, MRS and HRC, were also directly injured as a result of the practices and policies. Pet. App. 11a n.10, 43. MRS, as a designated qualified entity, had entered into an agreement with INS which obligated it to counsel SAW applicants, including providing information regarding supporting documentation requirements and reviewing the application for completeness before transmitting it to INS. For each application accepted by the INS, MRS was to be reimbursed sixteen dollars ($16.00). R, at 2d Supp. Vol. 2, p.138.

Through years of pastoral work among the rural farmworker communities, MRS had built up a reservoir of goodwill and trust. R. at 2d Supp. Vol. 2, p.125. Because of the assumption that many of the alien farmworkers would otherwise be reluctant to come forward and apply for legalization, MRS decided, in the words of Father O'Loughlin, to puts its "credibility at the service of the legalization effort." R. at 2d Supp. Vol. 2, pp.125-26. That credibility was severely damaged when applicants who had been advised by MRS had their

applications rejected because of defendants' practices. R. at 2d Supp. Vol. 2, pp.129-30. Disgruntled applicants, desperate for work authorization, began withdrawing their applications from MRS. R. at 2d Supp. Vol. 2, p.122. Hundreds of other applications were abandoned because of INS' practices. R. at 2d Supp. Vol. 2, p.130.

The challenged INS practices and procedures made the cost of assisting applicants, both in time and money, greatly exceed what had been anticipated at the time MRS had entered into its contract with INS, forcing MRS to divert personnel who were involved in housing, health and literacy programs to the legalization effort. R. at 2d Supp. Vol. 2, p.126. This, in turn, led to internal friction within MRS. R. at 2d Supp. Vol. 2, p.132. The staff and volunteers in one parish became so frustrated with the difficulties in obtaining the type of proof required by the INS that they resigned, thus forcing the office to close. R. at 2d Supp. Vol. 2, p.128; Plaintiffs' Trial Exhibit ("Px") 51.

The Haitian Refugee Center ("HRC") experienced similar problems. HRC is a nonprofit membership corporation organized under the laws of the State of Florida. Its membership consists of Haitian refugees and its main function is to provide its membership with legal representation. R. at 2d Supp. Vol. 2, pp.153-54. The escalating demands of the SAW program produced by the challenged practices and procedure made HRC's work of assisting the Haitian refugee community more difficult and resulted in the diversion of HRC's limited resources away from members and clients having other urgent needs. R. at 2d Supp. Vol. 2, pp.158-60. Neither HRC nor MRS had the resources to assist the denied applicants in filing administrative appeals. R. at 2d Supp. Vol. 2, p.8; R. at 2d Supp. Vol. 2, p.158.

Finding that the lawsuit brought by MRS, HRC and the class, "d[id] not challenge any individual determination of any application for SAW status," Pet. App. 37a-38a, the district court ordered only prospective relief as to the three procedural issues before it. Pet. App. 57a, ¶¶ 6-8. The district court did not reopen or order the reversal of any SAW application which was denied as a result of the lack of translators,

the lack of the record or the refusal of INS to permit witnesses. Pet. App. 56a-57a.

E. The Decision Of The Court Of Appeals

The court of appeals affirmed the preliminary injunction issued by the district court. The court recognized that MRS and HRC had injury in their own right which they sought to remedy in the district court. Pet. App. 11a n.10. The court of appeals concluded that: "[a]ppellees do not challenge the merits of any individual status determinations"; rather, "they contend that Defendants' policies and practices in processing SAW applications deprived them of their statutory and constitutional rights." Pet. App. 11a. The court of appeals specifically noted that "the individual Plaintiffs here do not seek substantive review of any individual ruling respecting their status, rather, they challenge the adequacy of the procedures employed in the processing of their SAW applications." Pet. App. 12a. The court of appeals held that INA § 210 did not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials, and that such a deprivation not only was not intended by Congress, but "would foster the very delay and procedural redundancy that Congress sought to eliminate." Pet. App. 11a. The court also rejected that government's argument that the plaintiffs had to exhaust their administrative remedies, finding that "the chances are remote that the INS would have considered substantial revision of the procedures devised for the processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application." Pet. App. 13a.

SUMMARY OF ARGUMENT

This action was brought by MRS, HRC, and a class of individuals, including persons who had not yet filed applications for SAW status, challenging on constitutional grounds the methods and procedures employed by petitioners to interview SAW applicants. The action did "not challenge the merits of any individual status determination." Pet. App. 12a.

The plaintiffs sought to ensure that the interview process under the program provided for a record that could be reviewed on appeal and that applicants could present witnesses and have their statements accurately translated so that individual review was possible and meaningful.

Petitioners assert that a constitutional challenge of this nature brought in district court is an action seeking "judicial review of a determination respecting an application for adjustment of status" and that district court jurisdiction is therefore barred by 8 U.S.C. § 1160(e), which provides that such review may take place only in the court of appeals and only in the context of the review of a deportation order. Such an interpretation of § 1160(e) is contrary to the statute's language, history and purpose. Moreover, petitioners' approach has repeatedly been rejected by this Court, particularly in cases, like this, where parties have challenged the methods or procedures used by an agency in making its substantive determinations, rather than the substantive determinations themselves. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986) (challenge to the *method* by which such amounts are to be determined rather than the *determinations* themselves); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 779 (1985) (the application of the preclusion statute is problematic when a disability applicant challenges not only the agency's determinations, "but also the standards and procedures used . . . "); *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233, 239 (1968) (Harlan, J., concurring) (assertion by selective service registrant that the procedures pursuant to which he was reclassified were unlawful).

This Court has repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action," *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), and that nonreviewability can only be demonstrated by " 'clear and convincing' evidence of a contrary legislative intent. . . . " *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). This presumption is of particular force where a " 'serious constitutional question' . . . would arise if a federal statute were

construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988).

The plain language of IRCA demonstrates that § 1160(e)'s jurisdictional bar does not apply here. The statute speaks only to the narrow circumstances of a denial of an individual application, referring throughout to "*a determination* respecting an application for adjustment of status," § 1160(e)(1); "review of such *a determination*," § 1160(e)(2)(A); and "the administrative record established at the time of *the determination*," § 1160(e)(2)(B). On its face, § 1160(e) does not apply to organizations such as MRS and HRC who do not seek individual review but applies only to preclude lawsuits that seek judicial review of the fact-finding and law-application functions that determine a specific individual's eligibility or ineligibility for legalization. The present suit, directed at the methods and practices of INS officials, challenges no such "determination" of any particular individual's eligibility for SAW status, and thus does not fall within IRCA's jurisdictional bar.

Not only is the government's construction of § 1160(e) at odds with the statute's clear language, but this construction would frustrate the purpose of the INA. Congress' purpose was to ensure a generous and expeditious program that acknowledged the special problems of alien farmworkers. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 83-88 (1986). Congress also provided a special status for community organizations, such as plaintiff organizations, and has accorded many of them – including MRS – the special status of Qualified Designated Entities. *See* 8 U.S.C. §§ 1160(b)(1)(A) and (b)(2). In doing so, Congress recognized the special relationship between community organizations and nonimmigrant aliens, and the need for such organizations to assist applicants in the process. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 72-73 (1986). In line with this statutory purpose, the litigation by MRS and HRC challenging INS' unconstitutional methods and procedures in the SAW application process was commenced in order to insure that an adequate record for review was created. Permitting this action, far from frustrating the statutory purpose, effectuates Congress' intent: to insure a generous, expeditious program that would "grant immediate permanent residence to agricultural workers – to benefit the

workers – and to guarantee growers an ample supply of nondomestic agricultural workers – to benefit the growers." 132 Cong. Rec. H8517 (daily ed. Sept. 26, 1986) (Statement of Rep. Mazzoli).

The legislative history of the INA clearly shows that Congress rejected a restrictive judicial review provision contained in a prior Senate version, which would have precluded jurisdiction in a case such as this, and instead adopted the more limited preclusion provision contained in the House provision. See *infra*, pages 46-47. Congress' final choice of language clearly demonstrates that it intended to preserve federal jurisdiction over cases such as this one while at the same time addressing the problem of delays occasioned by piecemeal review of individual determinations. By contrast, the government's interpretation of § 1160(e) would: (1) delay immeasurably, if not preclude entirely, resolution of claims that the agency is systematically and unfairly obstructing the ends sought to be achieved by the SAW program; and (2) require the federal courts of appeal to address on a case-by-case basis claims that can efficiently and adequately be resolved only in the forum of a trial court capable of creating an appropriate record.

The petitioners' broad preclusion argument also raises "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988). Plaintiffs' constitutional claims, as petitioners concede, may not be addressed at the administrative level. Pet. Br. at 18 n.14. *See also, Califano v. Sanders*, 430 U.S. 99, 109 (1977). Similarly, plaintiffs' right to obtain adequate review of its constitutional claims in the court of appeals under the statutory scheme is wholly dependent upon INS' choosing to place an applicant in deportation proceedings. Because the SAW statute provides a wall of confidentiality between farmworkers whose applications are denied and the INS, 8 U.S.C. § 1160(b)(6), the applicant may obtain judicial review of his application only if INS apprehends him based on evidence derived from a source independent of his SAW application or if he comes forward *and* INS, *within its*

unreviewable discretion, chooses to place the applicant in a deportation proceeding.

A serious constitutional question is thus raised for four separate reasons. First, petitioners' interpretation would deny to organizations such as HRC and MRS any opportunity to redress the direct harm caused to them by the government's unconstitutional policies. *Bowen*, 476 U.S. at 681 n.12. Second, the alien must subject himself to arrest and deportation and forego his statutory right to confidentiality under the SAW program in order to be eligible to obtain judicial review. *See Rusk v. Cort*, 369 U.S. 367, 375 (1962) (finding federal jurisdiction notwithstanding a separate review provision for challenging loss of citizenship where a person, to utilize the statute, "must travel thousands of miles, be arrested and go to jail"). Third, even where the alien takes such steps, review is wholly within the discretion of an executive officer. *See United States v. Nourse*, 31 U.S. (9 Pet.) 8, 28-29 (1835). Finally, even if the applicant is able to obtain review in the court of appeals, 8 U.S.C. § 1160(e) precludes that court from developing an adequate factual record, preventing it from being a competent forum to address the applicant's constitutional claims. *Cf. Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring); *Johnson v. Robison*, 415 U.S. 361, 367-74 (1974).

ARGUMENT

I. THERE IS A STRONG PRESUMPTION OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, PARTICULARLY WHEN CONSTITUTIONAL CLAIMS ARE INVOLVED

This Court has repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). *See also, Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985); *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Barlow v. Collins*, 397

U.S. 159, 166-67 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This presumption not only originates in the Administrative Procedures Act, *Abbott Laboratories*, 387 U.S. at 140, but in the very foundation of the Court's power to maintain judicial review. *Bowen*, 476 U.S. at 670 (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) and *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)).

This Court has noted that judicial review of administrative actions "is the rule, and nonreviewability an exception which must be demonstrated," *Barlow v. Collins*, 397 U.S. at 166-67, and that nonreviewability can only be demonstrated by "clear and convincing evidence of a contrary legislative intent." *Abbott Laboratories*, 387 U.S. at 141; *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946), U.S. Code Cong. Serv. 1946, P. 1195.

Moreover, this Court has also repeatedly acknowledged that " '[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.' " *Lindahl*, 470 U.S. at 782 (*citing Abbott Laboratories*, 387 U.S. at 141).

The strong presumption favoring judicial review is of particular force in cases raising constitutional questions where divesting the Court of jurisdiction to review an administrative action would create "the 'serious constitutional question' that would arise if a federal statute were to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988). *See also, Bowen*, 476 U.S. at 681 n.12; *Johnson v. Robison*, 415 U.S. 361, 367-74 (1974); *Oestereich v. Selective Service Systems Local Board No. 11*, 393 U.S. 233, 237-38 (1968).

Thus, even where statutes on their face bar judicial review of agency action, this Court has interpreted them to permit review of *constitutional* claims. *E.g., Johnson*, 415 U.S. at 367-73 (noting that if veterans' benefits statutes were interpreted to bar judicial review of constitutional challenges, it would "raise serious questions concerning [its] constitutionality," and finding an exception for judicial review of constitutional claims). *Weinberger v. Salfi*, 422 U.S. 749

(1975); *Oestereich*, 393 U.S. at 237-38; *id.* at 240-43 (Harlan J., concurring); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955); *Estep v. United States*, 327 U.S. 114, 120-23 (1946); *id.* at 128 (Murphy, J. concurring); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334-37 (1932).

The petitioners' broad reading of the administrative and judicial review provision of the SAW statute ignores the strong presumption favoring judicial review and reads the statute in a manner inconsistent with its language, its structure and purpose, its legislative history and the nature of the action before this Court. Although the presumption favoring judicial review can be overcome in appropriate circumstances, those circumstances are not present here. The language of 8 U.S.C. § 1160(e) purports to restrict administrative and judicial review only for nonorganizational, individual applicants who seek review of a denial of their SAW application on a completed record on appeal. The purpose of the statute would be enhanced by permitting a constitutional challenge in the district court concerning INS' practices and procedures; indeed, the legislative history supports jurisdiction in such an action which would enhance and expedite the review process. As the objective of respondents' action was to permit a full record to be developed for purposes of review, district court action is fully consistent with the statutory scheme.

II. PETITIONERS HAVE NOT OVERCOME THE PRESUMPTION IN FAVOR OF JUDICIAL REVIEW IN THIS CASE

Respondent organizations MRS and HRC, and class members, including a class of persons who have not yet filed applications under the SAW program, brought this action to challenge the methods and procedures that were used by INS to establish a record for administrative and judicial review. This case "d[id] not challenge any individual determination of any application for SAW status . . . " Pet. App. 37a-38a. The substantive changes ordered by the district court (paragraphs 6, 7 and 8 of the district court's order) are not challenged by

the petitioners here, and this relief did not effect a single SAW application that had been denied because it was prospective only. Pet. App. 57a.

A. Section 1160(e) Cannot Be Read To Preclude Constitutional Challenges To INS Conduct By Organizational Plaintiffs

On its face, § 1160(e) simply does not apply to organizations such as MRS and HRC. The statutory language is limited to review of individual applications filed by SAW applicants. Indeed, petitioners admit that organizations such as MRS and HRC "of course, cannot themselves obtain review of the operation of the SAW program by raising claims on review of an order of deportation or exclusion." Pet. Br. at 23.

Because the organizational plaintiffs do not seek review of any individual determination, but rather the method in which the determinations were made, this case is controlled by *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). In *Bowen*, an organization of family physicians and several individual physicians filed suit in district court challenging a PHS regulation authorizing the payment of Medicare Part B benefits in different amounts for similar physicians' services. The government made exactly the same argument there that it makes here, contending that the Medicare Act impliedly foreclosed judicial review of any action taken under Part B because it failed to authorize such review while simultaneously authorizing judicial review of "any determination . . . as to . . . the amount of benefits under Part A." *Bowen*, 476 U.S. at 673. This Court rejected the government's arguments in *Bowen*, holding that the district court had jurisdiction over the plaintiffs' challenge to the reimbursement regulation. This Court reasoned that the provisions detailing how and in what forum an individual could obtain review of a determination as to the amount of benefits "simply [do] not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (emphasis in original). The Court distinguished *Heckler v. Ringer*, 466 U.S.

602 (1984), the case heavily relied upon by petitioners here, as a case seeking review of an amount determination. *Id.* at 677-78 n.7.[6] Because this case does not seek review of the denial of any application for SAW status, *Heckler* is similarly distinguishable here.

In *UAW v. Brock*, 477 U.S. 274 (1986), the UAW and several of its members challenged the Secretary of Labor's interpretation of the benefit eligibility provisions of the Trade Act of 1974. This Court similarly rejected the Secretary's contention that the restrictions on judicial review of individual benefit determinations deprived the district courts of jurisdiction in any case where an individual benefit determination would be affected:

> The Secretary's arguments simply miss the point of petitioner's claims. The statutory challenges raised

[6] The distinction between *Heckler v. Ringer* and the present case is obvious. In *Ringer*, the Court held that Ringer's cause of action – namely, that the Secretary's ruling barring reimbursement for a certain medical procedure was invalid under the Medicare Act – constituted "a claim arising under" the Medicare Act within the meaning of the judicial preclusion provision. 466 U.S. at 621. Unlike the Medicare Act, IRCA nowhere attempts to define and prescribe the method of review for all "claims arising under the Act." Far from providing an analogy for how IRCA should be construed, the broad terminology employed in 42 U.S.C. § 405(h), expressly providing that no action shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under [subchapter A] of the Medicare Act, illustrates that Congress knows how to draft a comprehensive jurisdiction-preclusion provision when it wants to.

Bowen was originally remanded to the lower court for further reconsideration in light of *Heckler v. Ringer*, 466 U.S. 602 (1984). *See*, 469 U.S. 807 (1984). On remand, the court of appeals specifically addressed the question of whether the Michigan Academy of Family Physicians, a nonprofit corporation, was entitled to challenge a Medicare regulation in district courts since § 405(g) administrative review was not available to it, as it was to individual claimants. The court of appeals concluded that *Ringer* did not proscribe challenges to the Medicare Act where the challenge was made by a party other than a claimant for benefits. *Michigan Academy of Family Physicians v. Blue Cross and Blue Shield of Michigan*, 757 F.2d 91, 94 (6th Cir. 1985). The decision was subsequently affirmed by this Court. 476 U.S. 667, 669 (1986).

> here will no doubt affect the outcome of individual entitlement determinations if petitioners are successful on the merits of their suit. However, this action does not directly seek . . . [individual] benefits.

477 U.S. at 284.[7] Similarly, this case does not seek "reversal of INS' denials of SAW applications in particular cases," as petitioners argue. Unlike the situation in *Ringer* where the claims of the plaintiffs, although couched in procedural language, were "at bottom, a claim they should be paid for their BCBR surgery," the injunctive relief ordered by the district court at issue here does not dictate the outcome of any

[7] Petitioners attempt to distinguish *UAW v. Brock* on two grounds. First, they argue that *Brock* does not apply because the plaintiffs there were seeking review of *federal* guidelines and the statute only confined judicial review of *state* agency determination to the state courts. Significantly, *Brock* rejected the same argument echoed here by petitioners – that the limitation on review of "*a determination* . . . with respect to entitlement to program benefits" contained in § 2311(d) "irrevocably commits to state processes *all claims* relating to TRA entitlements." *Brock* at 284 (emphasis added). That rejection did not rest on the division of responsibilities between different agencies, as suggested by petitioners, but on the longstanding principle that "although review of individual eligibility determinations in certain benefits programs may be confined by state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court." *Id.* at 285 (*citing Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977); *Fusari v. Steinberg*, 419 U.S. 379 (1975); *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971); and *Christian v. New York State Dept. of Labor*, 414 U.S. 614 (1974)). For example, in *Christian*, the Court again drew the crucial distinction between review of individual determinations and review of the policies upon which such determinations are made: "the fact that the employing agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedures used to reach that determination." *Id.* at 622. Petitioners also argue that the holding in *Brock* was "necessary to assure some federal forum for initial review of the Department of Labor's substantive rules," but that "district court jurisdiction is not needed for that purpose under IRCA." *Brock*, however, does not say anything about the necessity for initial review of substantive rules, nor do petitioners ever explain how one could obtain an "initial" review of INS rules under their interpretation of § 1160(e).

particular case. Because INS must provide competent translation or accurately record what is said by the applicant at the interview, it is not thereby obliged to rule in the applicant's favor.[8]

B. To Deny District Court Jurisdiction In This Case Would Effectively Foreclose Any Meaningful Review Of Constitutional Violations Which Are Uncontested By Petitioners In This Court

This case comes before this Court upon the unchallenged finding by the district court that respondents were irreparably harmed by the constitutional violations alleged. Pet. App. 53a. Noting that the opportunity to apply for legalization was of limited duration, the district court was unable to find that *any* monetary remedy would compensate for the loss of benefits afforded by U.S. residency. *Cf. Agosto v. INS*, 436 U.S. 748, 754 (1978) (*citing Ng Fung Ho v. White*, 259 U.S. 276 (1922) (deportation may result in loss "of all that makes life worth living")). The district court also found that the deprivation of work authorization for persons who lead the marginal existence of farmworkers also constituted irreparable harm. Pet. App. 55a. Petitioners do not contest those findings here.

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[8] Contrary to the implication of petitioners' grandiose claim that the relief granted by the district court "makes manifest that the complaint's purpose was to achieve, on a mass scale, review and reversal of INS' denials of SAW applications in particular cases," the district court did not order that class members be granted SAW status. Nor did its order in any way interfere with the INS' role as the ultimate determiner of eligibility under the statute and regulations. Indeed, "at the administrative level, the District Court showed proper respect for the administrative process." *Bowen v. City of New York*, 476 U.S. 467, 485 (1986) (upholding order requiring reopening of more than 50,000 social security cases). While petitioners profess to be very concerned about the inconvenience of having to reopen the 20,000 cases which were denied under improper procedures, paradoxically they have chosen not to appeal those provisions of the preliminary injunction which required them to reopen the cases. Instead, the only provisions of the district court's order at issue here are paragraphs 6, 7 and 8 which are wholly prospective in nature, and thus could not possibly have affected any prior determination respecting a SAW application.

The respondents' successful constitutional challenges to INS' procedures and policies could not, in effect, have been raised through the review process described in § 1160(e). As a result, the government's position that respondents were limited to that process creates "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988). Respondents were prevented from raising their constitutional claims through the § 1160(e) review process for four reasons. First, organizational plaintiffs are not afforded the review process to redress their own injuries arising out of INS' constitutional violations. Second, the individual applicant must subject himself to arrest and possible deportation in order to be eligible to obtain judicial review of his claim. Third, judicial review is wholly dependent upon the discretion of INS officers who must choose to initiate a deportation process in order for review to occur. Fourth, even if an applicant could appeal to the circuit court, that court, lacking an adequate factual record, is prevented from being a competent forum to address the applicant's constitutional claims.

1. Section 1160(e)'s review process does not permit respondents to effectively raise their constitutional claims.

While conceding that the LAU lacked the authority to address the constitutional claims of MRS, HRC and class members, Pet. Br. at 23 and 18 n.14,[9] petitioners insist that at

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[9] The petitioners acknowledge that *Califano v. Sanders*, 430 U.S. 99, 109 (1977) precludes constitutional review of class members claims in the administrative forum. In *Califano*, this Court noted that: "[c]onstitutional questions are unsuited to resolution in administrative hearing procedures and, therefore, access to courts is essential to the decision of such questions." Although petitioners argue that the LAU "could be urged to afford commensurate relief on statutory grounds," Pet. Br. at 18 n.14, this claim ignores the fact that the right to a translator, to a completed I-696, or to present witnesses at a SAW interview were not based upon any statutory right under IRCA or

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least class members could obtain judicial review of these claims. Pet. Br. at 18.[10] This assertion is illusory for several reasons.

First, class members would have to subject themselves to arrest and deportation in order to be eligible to obtain review. Under § 1160(e), a farmworker whose SAW application has been denied can only obtain review of that application if he is in a deportation or exclusion hearing. *Noriega-Sandoval v. U.S. INS*, ___ F.2d ___ (9th Cir. Aug. 13, 1990). Because the confidentiality provision of the SAW statute, 8 U.S.C. § 1160(b)(6), prevents INS from using any information from the SAW application as a basis to institute deportation proceedings, those proceedings can only be brought if INS obtained evidence from an independent source that the applicant was illegally in the United States. A class member, therefore, could only be eligible to obtain judicial review of his constitutional claims if he presented himself to INS, subjected himself to arrest and sought to have a final deportation order entered against him. This process poses potentially serious problems for class members who are not deportable because they entered the United States under the H-2A temporary agricultural worker program, 8 U.S.C. § 1101(a)(15)(H)(ii)(A), and maintained their lawful status, and for farmworkers who are outside of the United States at

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the INA, but rather, were constitutionally derived. Indeed, in the appellate court – the very court in which individual applicants would have sought review – the petitioners, including the Attorney General, argued that these claims could not be derived from the INA or IRCA. Appellants' Reply Brief at 12-19 (arguing that "the statute, the regulations and due process do not require the Immigration and Naturalization Service to provide a translator at interviews with SAW applicants, to give SAW applicants the right to call witnesses at such interviews, or to prepare a written statement particularizing the evidence offered, testimony taken, and credibility determination made").

[10] Petitioners concede that the organizational plaintiffs could not raise constitutional claims to the circuit court of appeals through § 1160(e). Pet. Br. at 23.

the time of their denial. Requiring farmworkers to be subjected to deportation when they may not be deportable or to submit to arrest and deportation simply to obtain review under § 1160(e), would pose "the serious constitutional question" that denying independent review raises. *Rusk v. Cort*, 369 U.S. 367 (1962). *See also*, Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives To Get Into Court?*, 25 Harv. C.R.-C.L. L. Rev. 53 (1990).

In *Rusk*, this Court granted independent federal review to a person contesting his loss of citizenship notwithstanding the review procedures set out in 8 U.S.C. § 1503(b) and (c). Because these latter provisions required a person living abroad to "travel thousands of miles, be arrested and go to jail in order to attack an administrative finding that he is not a citizen," 369 U.S. at 376, this Court found that the provisions did not preclude the broad remedial provisions of the APA.

An equally serious constitutional question posed by denying judicial review of applicants' constitutional claims except through § 1160(e) is that the decision to permit review functionally is given solely to the INS. Even if the farmworker presents himself for arrest and deportation solely to obtain review of his constitutional claims, INS may refuse, in its unfettered and unreviewable discretion, to institute deportation proceedings that under the statute, is a prerequisite to review.[11]

Under petitioners' theory, the district director, who alone may invoke deportation proceedings, would have the ultimate power to place INS altogether beyond the constraints of

[11] Nothing in the INA or its regulations provides a way for an alien to trigger the initiation of deportation proceedings against himself. Generally, every proceeding to determine the deportability of an alien is commenced by the filing of an order to show cause with the Office of the Immigration Judge. *See*, 8 C.F.R. § 242.1 (providing for the issuance of an order to show cause by one of a list of enumerated officials). The decision to institute deportation proceedings involves the exercise of prosecutorial discretion and is not reviewed by either the immigration judge or the BIA. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Merced*, 14 I&N Dec. 644 (BIA 1974); *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977).

judicial review, no matter how facially unconstitutional its actions may be, simply by choosing not to institute deportation proceedings against those affected. Petitioners' argument runs against the grain of the most fundamental tenets of our constitutional system: the separation of powers; the notion of a government of laws, not of men; and most importantly, the role of judicial review in protecting individuals' constitutional rights against abuses of government authority.[12]

The petitioners' ability to control when and if respondent class members could obtain constitutional review would place the marginal farmworkers involved here in the untenable position of continuing to suffer irreparable harm by being "denied the ability to earn a living and to support themselves." Pet. App. 55a.[13] This is precisely what would happen to class members whose applications were improperly denied on the basis that they were frivolous, were they to be required to await a decision to place them in deportation proceedings in order to raise their constitutional claims. Even a farmworker who desired being placed in a deportation proceeding to obtain judicial review would have to suffer irreparable harm for months or years, if not indefinitely.[14] Although the

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[12] *See United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835), where Chief Justice Marshall wrote: "It would excite some surprise if, in a government of laws and principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of this country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the Legislature of the United States."

[13] Under the SAW legislation, an applicant presenting a nonfrivolous claim is entitled to work authorization until a final determination is made in his case. 8 U.S.C. § 1160(d)(2). The denial of work authorization in this context is a denial of liberty and property interests. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Examining Board v. Flores de Otero*, 426 U.S. 572, 604 (1976) (*citing Truax v. Raich*, 239 U.S. 33, 41 (1915)); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

[14] For example, under petitioners' analysis, the district director could interpret IRCA to apply to only male (or European, or brown-eyed) aliens,

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SAW program ended in November, 1988, no reported decision from a denial of SAW status in the context of review of an order of deportation or exclusion has yet to reach the circuit court of appeals.[15]

2. The restrictive review provisions of § 1160(e) prevent constitutional challenges to a deficient administrative record.

Not only is such "conditional" review totally inadequate, but substantial doubt also exists concerning whether the courts of appeal are fully competent to adjudicate respondents' constitutional claims under the restrictive review procedures established by the statute. Both administrative appellate review and circuit court review are restricted under the statute to "the record established at the time of the determination on the application and upon such additional or newly discovered evidence as may have been available at the time of the determination." § 1160(e)(2)(B); cf. § 1160(e)(3)(B). The various regulations circumscribing the record that can be made at the administrative level and the scope of authority of the LO, RPF and LAU reveal that there is no point during the process when an applicant can make an

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deny legalization to all others, and be immune from any challenge in the courts until (1) those aliens who had spent the time and money to apply despite the policy disqualifying them had received final denials of legalizations; (2) these aliens at some subsequent point in time found themselves arrested and taken into custody by the INS; (3) put into deportation proceedings; (4) lost their deportation hearings; (5) appealed to the BIA; (6) lost their appeal to the BIA; and (7) appealed their final orders of deportation to the court of appeals. Persons not subsequently placed in deportation proceedings could never, under petitioners' view, challenge such a blatantly illegal policy.

[15] Because § 1160(e) provides no time frame to obtain judicial review, *Yakus v. United States*, 321 U.S. 414 (1944) is not relevant. This Court in *Yakus* found that the expedited procedure to challenge a decision by the wartime Price Administrator followed by review in an Emergency Court of Appeal provided a reasonable opportunity to be heard and an applicant did not have to subject himself to penalties prior to obtaining review.

appropriate record for the court of appeals or have the relevant legal issues adjudicated and preserved for review. To withhold district court review in this case would thus deprive respondents of their liberty interest in SAW status without the opportunity to present to *any* competent forum – agency or court – their substantial claim that they were denied pursuant to unlawful procedures involving the creation of the record. Such an interpretation of § 1160(e) would raise a serious constitutional problem.[16]

Moreover, a challenge to the validity of the administrative procedure itself presents an issue beyond the competence of the INS to hear and determine. Where, as here, the administrative violations alleged go directly to the integrity of the record, review based on the record as established by the agency would be an exercise in futility.

The crux of respondents' constitutional claim is that they have been denied "a meaningful opportunity to be heard." *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). When their words or the words of witnesses in their behalf are not preserved for the record, or are not properly translated, they

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[16] Cf. *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring). In *Oestereich*, a selective service registrant brought a pre-induction action challenging the lawfulness of the procedure by which he was reclassified and ordered to report for induction despite a provision of the Selective Service Act which provided that "[N]o judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded . . . to an order to report for induction . . . " Justice Harlan, though concurring in the court's opinion that pre-induction review was available, offered a different analysis than that of the majority. Noting first that "[i]t is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims," he then found that the options of defending a criminal prosecution or filing a petition for habeas corpus after induction would not provide meaningful review. *Id.* at 243 n.6. In order to avoid the constitutional problems that were thus presented, Justice Harlan read the preclusion statute not to prohibit review of claims of procedural irregularity, but only review of factual and discretionary decisions inherent in the classification of registrants. *Id.* at 241-43. *See also, Estep v. United States*, 327 U.S. 114, 129-30 (1946) (concurring opinion of Mr. Justice Murphy). The same considerations dictate a similar approach here.

have not been "heard." Any attempt to raise this claim before the LAU would similarly be futile because that body is restricted by the statute to examining only "the administrative record established at the time of the determination of the application" and any "additional or newly discovered evidence as may not have been available at the time of the determination." 8 U.S.C. § 1160(e)(2)(B). The "record established at the time of the determination" would normally consist of the application, supporting documents, and the interviewer's notes on the I-696, if any. If the interviewers did not transcribe what the applicant said at the interview, or as testimony at trial indicated, did not note that a translator was used or indicate that translator's qualifications, then the only way in which the applicant could raise those issues at the appellate level would be by introducing evidence outside of the record as to what transpired at the interview, which the statute specifically forbids.[17] The same difficulty would be presented at the judicial level, where review again is based "solely upon the administrative record established at the time of review by the appellate authority." 8 U.S.C. § 1160(e)(3)(B). The findings of fact and determinations contained "*in such record*" are made conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained *in the record* considered as a whole. *Id.* If the record of the interview is incomplete or totally lacking, presumption in favor of the agency's findings could never be overcome. As the court of appeals noted, "[w]ithout any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. 16a, *citing Kent v. United States*, 383 U.S. 541, 561 (1966) ("meaningful review requires that the reviewing court should review").

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[17] As noted previously, petitioners' regulations do not permit applicants to file motions to reopen. 8 C.F.R. § 103.5. Nor does it seem likely that evidence regarding what occurred at the interview could be characterized as "additional or newly described evidence as may not have been available at the time of the determination."

3. The court of appeals is not a competent forum to address respondents' constitutional claims in the first instance.

Even if respondents could have made an objection on due process grounds during the course of review proceedings under § 1160(e), there is no way they could have raised their constitutional claims on the record so as to secure meaningful judicial review from the circuit court. Under the three-part test established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in order to determine what process is due in the administrative context, courts must determine first "the private interest that will be affected by the official action, second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *See also, Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (*Mathews* test appropriate for evaluation of procedures in immigration context). These considerations are simply beyond the scope of administrative review and the underlying facts on which such an analysis must rest are not readily ascertainable in the context of an individual applicant's case.[18]

The courts of appeal have no way to independently develop a factual record on these issues,[19] and it is well

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[18] For example, even were the circuit court to reach the issue of whether due process required that competent translation be provided, it is very unlikely that it could determine from the record of the individual case what percentage of applicants required translation, what languages were typically spoken, what were the existing language capabilities of the INS staff, and whether competent translators in the key languages were readily available. These matters were only ascertained through discovery and at the preliminary injunction hearing in this case.

[19] Much of the information needed to establish a *Mathews* analysis is exclusively within the control of the government and could not be obtained by an applicant without resorting to the discovery devices allowed under the Federal Rules. The absence of any opportunity to examine INS officials under oath also frustrates any review of constitutional violations within the context

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established that a deficient factual record cannot be remedied in the court of appeals. *Congress and Empire Spring Co. v. Knowlton*, 103 U.S. 49 (1881); *Hefner v. New Orleans Public Service, Inc.*, 605 F.2d 893 (5th Cir. 1979); 4A C.J.S. Appeal and Error § 1206. Moreover, it would be most anomalous to conclude that circuit courts could remand SAW cases back to the BIA or the immigration judge for a final hearing on factual matters that they lacked authority to hear in the first place. For precisely this reason, a substantial doubt exists concerning whether respondents' claims could ever be raised in the court of appeals, particularly since that court's jurisdiction is specifically limited to reviewing the administrative record established at the time of review by the appellate authority.[20]

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of the administrative process established by petitioners. In the present case, the use of the lists of "suspect" affiants to deny applicants was only brought out at the hearing on the preliminary injunction. There was no way that an individual applicant would have been in a position to contest the use of such lists in the context of an individual appeal.

These problems are highlighted by petitioners' contention that permitting district court review "breeds confusion about the appropriate record and standard of review." The contrast between the record of an individual case (see, e.g., the legalization file of respondent Jean-Phillipe Marie France, Px. 54, J.A. 63) and the record of this case is striking. Petitioners' statement, that "[t]here is no ready way for district courts to apply [the standard for review at 8 U.S.C. § 1160(e)(3)(B)] in broad class actions addressing generalized issues divorced from the circumstances of a particular case" only underscores the fact that a review of an individual determination is utterly dissimilar from a constitutional challenge to illegal across-the-board agency action, and that the highly restrictive standard at § 1160(e)(3)(B) was intended to apply only to the review of individual cases and not to constitutional review which applies a *de novo* standard.

[20] In the analogous situation, where petitions have raised constitutional or other claims requiring a factual hearing in review of a § 242(b) deportation proceeding, the courts have held that they lack jurisdiction to review a "recordless decision" and that petitioners must bring an original action in the district court. *See, e.g., Olaniyan v. District Director, INS*, 796 F.2d 373 (10th Cir. 1986); *Mohammadi-Motlagh v. INS*, 727 F.2d 1450 (9th Cir. 1984); *Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982); *Abedi-Tajrishi v. INS*, 752 F.2d 441 (9th Cir. 1985). *See also, Dastmalchi v. INS*, 660 F.2d 880 (3d Cir. 1981); *Tooloee v. INS*, 722 F.2d 1434, 1437 (9th Cir. 1983).

In the final analysis, the prospect of judicial review in the court of appeals held out by the petitioners is illusory.[21] To deny review in the district court would be to deny review altogether of respondents' colorable constitutional claims. Petitioners can point to nothing in either the language of the statute or in its legislative history which clearly reveals an affirmative intention on the part of Congress that such review be unavailable.

C. The Language of § 1160(e) Mandates Rejection Of Petitioners' Argument That The District Courts Lack Jurisdiction To Review Any Aspect Of The SAW Program

The actions by INS which form the basis for respondents' complaint were not routine decisions of individual adjudicators with respect to the merits of particular applications. Instead, they are more akin to the "wholesale, carefully

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[21] The only circuit court cases thus far which address the review of individual legalization applications are not to the contrary. In *Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990), the court set aside a denial by the LAU because the INS had applied the wrong legal standard in concluding the applicant had been convicted of a crime. Only a question of law was presented. In *Farrokhi v. U.S. INS*, 900 F.2d 697 (4th Cir. 1990), an alien attempted to raise his possible entitlement to legalization as a defense in deportation proceedings. Since there had been no final judgment on his legalization application at the time of his appeal from the BIA decision, the circuit court found that there were no facts by which the court could review his application consistent with the statutory requirements of deference to the appellate administrative record. Most recently, in *Noriega-Sandoval v. U.S. INS*, ___ F.2d ___ (9th Cir. Aug. 13, 1990), the Ninth Circuit held that it lacked jurisdiction to review the LAU's denial of an application for legalization under IRCA except in the context of a review of an order of deportation. Finding that the plain language of the statute "clearly expresses Congress' intent to permit *appellate* review of *denials* of adjustment solely within the context of our review of orders of deportation," the court distinguished its holding from the question presented here: "[t]he jurisdictional question raised here concerns the merits of an individual application. For this reason, this case is dissimilar to the class or group challenge concerning executive branch compliance with immigration law which was presented in *Haitian Refugee Center v. Nelson*, 872 F.2d 1555 (11th Cir. 1989) . . . "

orchestrated, program of constitutional violations" alleged in *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982). The case involved here challenged INS policies and procedures of relying on secret lists of "suspect" affiants, denying applicants the opportunity to hear and rebut adverse evidence, denying applicants the right to translators necessary to adequately present their cases, and depriving them of their right to present witnesses and to have an accurate record of proceedings. These challenged actions all reflect decisions made by those in charge of the overall administration of the program, not individual determinations in particular cases. Such policy decisions of general applicability by high level administrators can in no way be considered "determination[s] respecting an application" and therefore, the jurisdictional limitation at 8 U.S.C. § 1160(e) simply does not apply in this case.

Petitioners attempt to circumvent the limiting language of § 1160(e) by arguing that "a determination respecting an application" includes any policy or practice that might affect the outcome of a class of individual applications, as well as determinations made in individual cases. The plain language of the statute does not support that expansive reading.

The entire subsection dealing with administrative and judicial review under § 1160(e)(1) makes clear that Congress used the phrase "a determination respecting an application" to refer to a specific determination of a specific individual application, i.e., ascertaining the facts of an individual's application for SAW status and applying the law to those facts. The words "application for adjustment of status" refer to a written document submitted by an individual applicant. 8 U.S.C. § 1160(b). This application is a specific document which "may be filed" with the Attorney General or a QDE. *Id.* The INA requires the Attorney General to establish "a single level of administrative appellate review of such *a determination*." § 1160(e)(2)(A) (emphasis added). Such review "shall be based solely upon the administrative record established at the time of the *determination on the application*" and upon newly discovered evidence that was unavailable "at the time of *the determination*." § 1160(e)(2)(B) (emphasis added).

That the term "determination *respecting* an application" is restricted to the consideration of a particular applicant's case is further defined by the use of the word "denial" *in the same subsection of the Act* providing for judicial review under 8 U.S.C. § 1105a:

> There shall be judicial review of *such a denial* only in the judicial review of an order of exclusion or deportation under Section 1105a of this title.

8 U.S.C § 1160(e)(3) (emphasis added).

Thus, read as a whole, the paragraph limits judicial review of the denial of a SAW application. Where no *denial* of a particular *application* is sought to be reviewed, the district court's general federal question jurisdiction under 28 U.S.C § 1331 and specific statutory jurisdiction under 8 U.S.C. § 1329 remain unimpaired. The reference to "a denial" and the use of the modifier "such" make clear that only a final determination of an individual application is subject to the limitation on review, *not* the "determinations" of the district director or the director of the RPF as to broad policies or practices applicable to all cases. For this reason, organizational plaintiffs MRS and HRC and class members who had not yet filed applications could not be said to be seeking a review of "a determination respecting an application."

If Congress had wished to limit review in the manner in which petitioners suggest, it could easily have restricted review of "any claim arising under" the statute, as in *Heckler v. Ringer*, 466 U.S. 602, 615 (1984), or of "any action taken or decision made with respect to" the SAW program. However, § 1160(e) is addressed only to "*a determination* respecting *an application*." 8 U.S.C. § 1160(e) (emphasis added).

The petitioners' analysis of the language of § 1160(e) would also implicitly repeal 8 U.S.C. § 1329, despite congressional intent to the contrary. The immigration jurisdictional statute, § 1329, has a broad sweep that includes "all causes, civil and criminal, arising under any of the provisions of [] Title [II]" of the INA.[22] This statute predates § 1160(e) and

[22] Similar language in *Heckler v. Ringer*, 466 U.S. 602 (1984) was found to have a broad sweep encompassing all claims.

was the jurisdictional basis for lawsuits challenging INS' improper practices and procedures. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd on other issues as to judgment only*, 472 U.S. 846 (1985). Prior to the enactment of § 1160(e), there is direct evidence that Congress knew of and endorsed procedural and policy challenges, such as those here, under 8 U.S.C. § 1329.[23] Jurisdiction was permitted, notwithstanding the bar to judicial review under 8 U.S.C. § 1105a. The relevance of this matter is that § 1160(e) incorporated 8 U.S.C. § 1105a when it provided that the judicial review of a SAW denial could only occur in "the review of an order of exclusion or deportation under Section 1105a." § 1160(e)(3)(A). Congress, of course, is presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470

[23] In 1983, when the Senate was debating judicial review of asylum applications as part of an immigration reform bill, the following colloquy occurred regarding a provision which would make the provisions of chapter 158 or title 28 the sole and exclusive procedure for the judicial review of final orders of exclusion or deportation, notwithstanding 8 U.S.C § 1329 and 28 U.S.C. § 1331:

> MR. BIDEN: [W]ith regard to section 123(a)(2), my understanding is that the language in that section is intended to make clear that it establishes the sole basis for reviewing final orders of deportation or exclusion. There is no intention to overturn any cases providing for judicial review, other than final orders, in matters of pattern and practice when that is appropriate or in the following cases:
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> *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).
>
> *Louis v. Nelson*, No. 82-5772 (11th Cir. dec. Apr. 12, 1983).
>
> *Orantes-Hernandez v. Smith*, 541 F.Supp. 351 (C.D. Ca. 1982).
>
> Is my understanding correct?
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> MR. SIMPSON: Yes, Mr. President. The reference to section 279 of the Act and to section 1331 of title 28 is simply to make clear that they do not provide a basis for district court review of final orders.

129 Cong. Rec. 12,857 (May 18, 1983).

U.S. 768, 782 n.15 (1985), and to adopt the interpretation when it incorporates the prior law without change. *Id.*[24]

Here, the language of § 1160(e) does not specifically preclude judicial review of cases including procedural and policy challenges under 8 U.S.C. § 1329, notwithstanding the incorporation of § 1105a, where prior decisions support jurisdiction in the district court over the type of suit brought here.

Moreover, direct evidence of Congress' knowledge of the interpretation given § 1329 exists. Indeed, one of the sponsors of the IRCA legislation, Senator Simpson, participated in the colloquy recognizing the reach of 8 U.S.C. § 1329. Notwithstanding that knowledge, the farmworker legalization provisions, including § 1160(e), were placed within Title II of the INA and come within the broad sweep of 8 U.S.C. § 1329 addressing "all causes, civil or criminal, arising under any of the provisions of this title." The legislative history and judicial interpretation of 8 U.S.C. § 1160(e) and § 1329 confirm that Congress did not intend to preclude the type of constitutional challenge brought here under 8 U.S.C. § 1329.[25]

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[24] *See also, Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Bob Jones University v. United States*, 461 U.S. 574, 601-02 (1983); *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982).

[25] Although this Court held in *United States v. Fausto*, 108 S.Ct. 668, 676 (1988) that its interpretation of the Civil Service Reform Act of 1978 did not repeal by implication the Backpay Act, that case is not controlling here. In *Fausto* this Court recognized that the Civil Service Reform Act, "replaced [a] patchwork system with an integrated scheme of administrative and judicial review designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto*, 108 S.Ct. at 672. This Court in *Fausto* found that allowing a separate action under the Backpay Act would, in effect, turn the elements of the statute "upside down and would seriously undermine" them. 108 S.Ct. at 674. Reliance on 8 U.S.C. § 1329 here, however, is consistent with Congress' intent and prior judicial interpretation. There is nothing in the legislative history of the SAW legislation indicating that Congress intended to repeal the use of § 1329 for procedural challenges to unconstitutional agency conduct. Rather, the contrary is true. Furthermore, as demonstrated *infra* at 38-45, the action by plaintiffs enhances, rather than undermines, the structure and purposes of the farmworker legalization program.

Perhaps in recognition of the obvious linguistic difficulty in stretching the term "a determination respecting an application" to cover any and all aspects of the INS' administration of the SAW program, petitioners briefly argue in the alternative that if respondents are in fact challenging INS policies, practices and procedures "wholly apart from [their] concrete application in a particular case," respondents have failed to challenge an identifiable agency action "that is amenable to judicial review." Brief for Petitioners at 19, *citing Lujan v. National Wildlife Federation, et al.*, 110 S.Ct. 3177 (1990).[26] In effect, petitioners contend that nothing other than agency decisions on individual SAW applications can constitute reviewable agency action; if stretching the definition of what is precluded under § 1160(e) will not succeed, petitioners propose to shrink the scope of reviewable agency action to fit the definition.

The term "agency action," however, is not so easily cabined. "Agency action" is expansively defined in the Administrative Procedures Act to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Clearly, allegations that the agencies failed to provide competent translation for SAW applicants, refused to allow applicants the opportunity to present witnesses during the interviews, or failed to make a record of the initial interview would each constitute " agency action" under the APA.[27] Petitioners' effort to limit the concept to agency

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[26] Petitioners actually state that "if the complaint were *characterized* as challenging only *an* INS 'practice' wholly apart from its concrete action in a particular case," the complaint would fail to raise a reviewable issue. Pet. Br. at 19 (emphasis added). This statement, as petitioners acknowledge, simply does not reflect respondents' position as respondents are clearly adversely affected." Moreover, the issues raised by petitioners' reference to *Lujan* are not part of or fairly included within the question presented for review. Sup. Ct. R. 14.1.

[27] This is especially true in light of the provision's legislative history, which provides that "[t]he term 'agency action' brings together previously

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"determination[s] respecting" SAW applications is therefore simply unwarranted.[28]

D. The Purpose And Structure Of the SAW Program Fully Supports Respondents' Jurisdictional Claim

Far from displacing Congressional policy choices as alleged by petitioners, interpreting § 1160(e) to permit district

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defined terms in order to simplify the language of the judicial-review provisions of Section 10 *and to assure the complete coverage of every form of agency power, proceeding, action or inaction.* In that respect, *the term includes the supporting* procedures, findings, conclusions, or statements or reasons or basis for the action or inaction." *F.T.C. v. Standard Oil of California*, 449 U.S. 232, 238 n.7 (1980), *quoting* S. Doc. No. 248, 79th Cong., 2d Sess. 255 (1946) (emphasis added). *See also, Independent Broker-Dealers' Trade Association v. Securities and Exchange Commission*, 442 F.2d 132, 143 (D.C. Cir. 1971) (§ 25 (a) of the Securities and Exchange Act "applies in terms only to 'orders,' a narrower concept than that of 'agency action' reviewable in district courts"); *Kixmiller v. Securities and Exchange Commission*, 492 F.2d 641 (D.C. Cir. 1974) [same].

[28] Further, contrary to petitioners' assertion, Pet. Br. at 19, the actions sought to be reviewed here bear no similarity to those presented in *Lujan*. The procedures, policies, and practices challenged here by respondents are described with precision and particularity, and represent a discrete and fixed set of agency actions in the SAW adjudicative process. Plaintiffs Complaint ¶¶ 86, 87; J.A. 44-45. In contrast, the "land withdrawal review program" challenged in *Lujan* is a catch-all term which "does not refer to a single [agency] order or regulation, or even to a completed universe of particular [agency] orders and regulations," but merely to "the continuing (and thus constantly changing) operations of the [agency]." *Lujan*, 110 S.Ct. at 3189. This Court specifically noted in *Lujan* that if the challenge there was to policies that applied "across-the-board," the APA would provide review to a person adversely affected. *Lujan*, 110 S.Ct. at 3189-90 n.3.

Respondents' action failed in *Lujan* because "wholesale . . . programmatic improvements are normally made" in the halls of Congress or the offices of the Department instead of in the courts. *Lujan*, 110 S.Ct. at 3190. In contrast, respondents here do not seek an overhaul of the statute, nor a change of its regulations. Respondents simply seek to ensure that the agency acts in accord with constitutional due process requirements and consistent with the clear intent of Congress.

court review in the circumstances of this case would clearly effectuate the intent of Congress. In contrast to the dubious evidence of Congressional intent relied on by petitioners in support of their jurisdictional theory, the unambiguous evidence demonstrates that Congress' stated policies would be furthered by permitting district court review.

Congress clearly intended a "generous" legalization program. Legalization was motivated in part by humanitarian concerns for aliens who were long time residents of the United States,[29] but there were more pragmatic concerns as well. First, legalization enables the INS to focus its resources on the illegal entry of new aliens, thereby giving the United States more "enforcement for its dollar." S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985); *see* H.R. Rep. No. 682, Pt. 1, *supra* at 49. Second, legalization would "eliminate the illegal subclass now present in our society," whose members' weak bargaining position (stemming from their illegal status) was eroding U.S. wages and working conditions. S. Rep. No. 132, *supra* at 16.[30] Third, the SAW program was specifically meant to address the labor needs of agricultural employers.[31] To be effective in these goals it was essential that the legalization programs attract a large majority of eligible aliens. To this end, Congress intended a "generous program" that would be "implemented in a liberal and generous fashion" to "ensure true resolution of the problem and . . . ensure that the program [would] be a one-time program." H.R. Rep. No. 682, Pt. 1, *supra* at 49, 72.

Congress also clearly acknowledged the special problems that alien farmworkers would have in qualifying for legalization and sought to ease that burden. For example, in recognizing that many of the alien farmworkers were illiterate,

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[29] *See, e.g.*, H.R. Rep. No. 682, Pt. 1, *supra* at 49.

[30] *See also* 132 Cong. Rec. H9724 (daily ed. Oct. 9, 1986) (comments by Congressman Schumer, one of the proponents of the SAW legislation).

[31] For this reason, SAW eligible aliens who had actually left the United States to return to their home countries were allowed to apply outside the United States. 8 U.S.C. § 1160(b)(1)(B).

Congress exempted the SAWs from the language and citizenship requirements placed on temporary residents under the general legalization program. *Compare* 8 U.S.C. § 1255a(b)(1)(D) with 8 U.S.C. § 1160(a)(2). Most importantly, Congress recognized the unfairness that would result if farmworkers were required to document their work histories with non-existent payroll records, and accordingly, created a presumption in favor of worker evidence. 8 U.S.C § 1160(b)(3). Congress did not simply entrust policy-making in this regard to the Attorney General, but spelled out in the Conference Report its intent that the liberal standards of proof embodied in the Fair Labor Standards Act case law should apply. *See*, H.R. Conf. Rep. No. 1000, *supra* at 97.[32]

For the program to succeed, literally hundreds of thousands of poor, undereducated alien farmworkers, many of whom lived in isolated rural communities, had to be induced to come forward within the eighteen (18) month "window of opportunity" for filing applications. As noted previously, the efforts of the QDEs in providing the aliens with accurate information about the program and its requirements were thought to be key.[33] However, this effort would be utterly frustrated, as here, when local INS officials change the program's requirements in mid-stream to meet the exigencies of the moment. Pet. App. 32a, 36a.

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[32] With respect to the stay of deportation or exclusion granted applicants who made a nonfrivolous case of eligibility, the Conferees were even more specific in stating their intent that the INS allow aliens to qualify by making a declaration setting forth certain facts: "[t]he Conferees intend that the INS not go beyond these criteria in seeking to determine whether an alien has made a nonfrivolous case for eligibility. To do otherwise may undermine the purposes of this section, viz., to encourage undocumented workers to come forward and seek to obtain legal status." H.R. Conf. Rep. No. 1000, *supra* at 97.

[33] Senator Simpson, in a speech on the Senate floor urging adoption of the Conference version, underscored that the program would work only if it were widely publicized: "[s]o when they legalize they will have to know; as that call goes out, that this legalization period is existent, that they must come forward because this is the last call. This is the first call, and the last call, a one-shot deal. Come on out. Go to your church. We are not trying to fool you this time." 132 Cong. Rec. 33,217 (1986).

The purpose of the judicial review provisions of IRCA was to achieve finality, speed and the smooth operation of the system, and it would frustrate that purpose to read § 1160(e) to require that INS adjudicate thousands of cases under procedures which are constitutionally defective, without any possible correction until the application period expired.

In view of the purposes and policies which underlie the SAW program, petitioners' interpretation of § 1160(e) is simply untenable. It would have the anomalous result of: (1) delaying immeasurably, if not precluding entirely, resolution of claims that the agency adopted policies that systematically and illegally obstructed the end sought to be achieved by the SAW program; (2) relegating the QDEs which Congress had intended to play a key role in the legalization effort to waiting on the sidelines while their credibility, and thus their effectiveness, was undermined by INS conduct which rendered their advice and counsel worthless; and (3) requiring the courts of appeal to address on a case-by-case basis and with an inadequate record claims that can be efficiently and adequately resolved only in the forum of a trial court. In short, petitioners' view of the SAW legislation would impute to Congress a desire to obtain "nonuniformity, uncertainty and slowness in getting major legalization questions settled." *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1352 (D.C. Cir. 1989) (Wald, J., dissenting). Plainly Congress did not intend such a result, which would be counter to the many clear signals which Congress actually sent and which would subvert the major goals of the Act. It is much more sensible to assume that, in the absence of specific language precluding review, Congress meant to allow direct review so that egregious abuses of authority by the agency could be quickly corrected.

The structure and purpose of the SAW program, by encompassing community organizations including QDEs, further support these organizations' independent judicial actions. Through IRCA, Congress has recognized the importance of community organizations, such as plaintiff organizations, and has accorded many of them – including MRS – the special status of Qualified Designated Entities. *See*, 8 U.S.C.

§§ 1160(b)(1)(A) and (b)(2). In doing so, Congress recognized the special relationship between these community organizations and the individual nonimmigrant aliens:

> The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is distrust of authority and lack of understanding among the undocumented population. The Committee hopes that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward. To assist in this endeavor, the bill authorizes the Attorney General to fund outreach service . . .

H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1 at 73 (1986).[34]

The QDEs are required by the terms of their cooperative agreements with INS to perform the function of intermediaries between INS and the Act's beneficiaries. They are charged by IRCA with responsibility for outreach to the alien community, counseling of aliens and processing their applications for legalization.[35] Permitting the QDEs and membership

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[34] The importance of voluntary agencies and other organizations to the success of the legalization effort was recognized throughout the legislative debate that led up to the passage of IRCA. During a 1983 floor debate, Senator Simpson, IRCA's main sponsor in the Senate, stated: "[I]t is obvious that we cannot do the job that is required without the spirited assistance of voluntary agencies in this country, the nonvoluntary agencies and the service groups, and that is indeed what we envision . . . Further, the bill provides and this is a very important part of it, that voluntary agencies and other private and public organizations shall assist the aliens in preparing their applications for benefits under this program. Those are the organizations that will have all of the expertise and the skills necessary to assist the aliens in preparing the necessary documentation. It is going to be a case of, 'there is how you do it.' You may be assured that they will assist the aliens in preparing their documentation. They will also assist in the educational outreach program so that each and every eligible alien will be aware of the requirements . . . " 129 Cong. Rec. 12,813-14 (1983).

[35] Contrary to petitioners' brief, which suggests that the omission to sue from "Congress' careful description of the functions of a qualified designated

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organizations such as HRC to sue furthers the statutory purpose of providing potential applicants with accurate information regarding the program's requirements *before* they risk exposure of their illegal status by filing an application.

While essentially conceding that HRC and MRS meet the test for organizational standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982),[36] petitioners argue that the

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entity" is somehow evidence that no such role was intended, the description of the QDEs' functions in IRCA is sparse; applications may be filed with designated agencies which agree to forward the application to the INS after the alien has consented to such forwarding, 8 U.S.C. § 1160(b)(1)(A), and the INS is not permitted to have access to the files and records of the QDEs relating to an alien without the alien's consent. 8 U.S.C. § 1160(b)(5). This is not like *United States v. Erika, Inc.*, 456 U.S. 201 (1982), where the failure to authorize review for amount determinations of part B Medicare awards "[i]n the context of the statute's precisely drawn provisions" coupled with supporting legislative history led to the conclusion that Congress deliberately intended to foreclose further review. Nevertheless, it is reasonably clear from petitioners' own description that the purpose of the QDEs was "to provide information and assistance in a risk-free environment to aliens seeking to apply for legalization/special agricultural worker temporary residence," and that this effort was "designed to encourage mass participation by eligible applicants." *See*, Notices; Vol. 52 Fed. 9717, 9718 (March 26, 1987) [setting forth the terms of the cooperative agreements between the INS and the QDEs].

[36] HRC also brought suit "as a representative of its members, who have or *will be* denied Temporary Resident status, stays of deportation and work authorization" as a result of petitioners' policies and practices. Compl. para. 17; J.A. 23-24 (emphasis added). Claiming that "individual SAW applicants may not circumvent IRCA's judicial review provisions by commencing an action in district court," petitioners assert that HRC is without representative standing because under *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), there must be a showing that the members could sue "in their own right." However, the question is not whether there were any individual members of HRC who might have circumvented the administrative process in order to challenge determinations in their individual cases. Rather, it is whether there were individual members of HRC who had yet to apply or be interviewed. Such individuals would have a live interest in challenging the INS policies that would support standing in this case. There is no question that among HRC's membership are many such individuals. *See UAW v. Brock*, 477 U.S. 274, 283-85 (1986).

absence of a specific provision in IRCA giving such organizations judicial recourse impliedly precludes their claims under this Court's holding in *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). This construction stands the presumption of reviewability on its head.

Moreover, *Block* is inapposite. The Marketing Act at issue in *Block* contemplated "a cooperative venture among the Secretary [of Agriculture], handlers and producers the principal purposes of which [were] to raise the price of agricultural products and to establish an orderly system for marketing them," 467 U.S. 340 at 346. Handlers and producers – but not consumers – were entitled to participate in adoption and retention of marketing orders. The Act further provided for agreements among the Secretary, producers and handlers, for hearings among them, and for votes by producers and handlers. Nowhere in the Act, however, was there an express provision for participation by consumers in any proceeding. Accordingly, the Court concluded that in such a elaborate administrative scheme, the omission of any provision allowing for participation of consumers was sufficient reason to preclude judicial review at the behest of consumer groups. *Id.* at 347.

The situation here is much different. IRCA, unlike the Marketing Act, does not provide an elaborate structure for balancing competing private interests which might be upset by factoring yet another interest group into the equation. IRCA formally recognizes the QDEs as both the alien's representative and his or her "best friend." The statutory language of the SAW program *expressly* provides for the participation of QDEs in the process. 8 U.S.C. § 1160(b)(2). Litigation by the QDEs to redress their own injuries, therefore, furthers the purposes of the Act.

In contrast to *Block*, petitioners are unable to point to any direct statutory language or legislative history evidencing a Congressional intent to preclude review at the behest of QDEs and other organizations assisting aliens under the SAW statute. Petitioners' argument that Congress intended to preclude review rests on the fact that Congress expressly provided for review of individual determinations in § 1160(e) and did not

expressly authorize QDEs and other organizations to sue. This argument would invert the presumption of judicial review repeatedly acknowledged by this Court. Indeed, when the government made the same argument previously, this Court rejected it. *Bowen*, 476 U.S. at 674-75.

E. The Legislative History Of The Act Demonstrates That Congress Has Already Rejected The Limitation On Class Actions That Petitioners Seek From This Court

Petitioners contend there is no evidence that Congress intended the district courts to entertain constitutional challenges to INS conduct in administering the SAW program. However, the real question is not whether there is evidence that Congress specifically authorized review of agency action, since under this Court's holding in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967), such reviewability is to be presumed. Rather, the question is whether there exists clear and convincing evidence of a contrary intent. Evidence regarding intent to restrict reviewability must consist of " 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional, intent to preclude judicial review that is 'fairly discernible' in the detail of the legislative scheme." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673 (1986). *Accord, Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988).

Petitioners essentially proffer only one argument based on IRCA's legislative history. They contend that since the Senate abandoned a strict Senate provision precluding all judicial review of all aspects of the legalization program, by class action or otherwise, and acceded to the House provision which specifically provided for limited judicial review of denials of SAW applications, Congress could not have intended to open the door to the kind of action brought here. As a general matter, this Court has held that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and

indeterminate evidence of legislative intent." *Abbott Laboratories*, 387 U.S. at 141. Here, the evidence clearly points the other way; Congress specifically rejected a broadly worded provision which arguably would have barred the present suit for a much narrower one.[37] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1218 (1987).[38]

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[37] The bill in question, S. 1200, did not even contain a SAW program. S. 1200 would have established a general legalization program and explicitly provided that "there shall be no judicial review (by class action or otherwise) of a decision or determination under this section," and further provided that an alien denied adjustment of status under this legalization program "may not raise a claim concerning such adjustment in any proceedings of the United States or any State involving the status of such alien . . . " S. 1200, 99th Cong., 2d Sess., § 202(f) (1985). H.R. 3810 did provide for a SAW program and as passed by the House, contained what is now 8 U.S.C. § 1160(e). The Conference substitute adopted the House provision including the provisions with respect to judicial review. *See*, H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 96 (1986).

[38] Petitioners attempt to bolster their contention that the compromise struck by the Conferees meant to preclude all review other than review of individual determinations by pointing to a statement made by Senator Cranston during a 1983 floor debate over an immigration bill that ultimately was fatally stalled in conference in the 98th Congress. Senator Cranston advocated a judicial review amendment to the bill under discussion, S. 529, that would have "merely permit[ted]" a "very limited form of judicial review that "would [have been] available only when an improper denial of legalization is raised as a defense in a deportation proceeding already subject to judicial review." 129 Cong. Rec. 12,810 (1983). Contrary to the impression conveyed by petitioners, the Cranston amendment cannot be described as "much like the judicial provision later enacted in IRCA." S. 529 provided that "[n]o decision or determination made by the Attorney General under this Section may be reviewed by any court of the United States or of any State," S. 529, 98th Cong., 1st Sess. § 301(g)(1) (1983) (as reported). The Cranston amendment created a single exception to § 301(g)(1) to permit review of denials of adjustment if such denial was first raised in a deportation proceeding. *See*, 129 Cong. Rec. 12,810. By contrast, in the compromise adopted by the conference committee (fully three years after Senator Cranston's remarks),

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The language and legislative history of IRCA indicate that in enacting § 1160(e) Congress intended to "ensure that fair administrative reviews are conducted by INS and to provide for the complete consideration of all possible evidence to determine legalization" while at the same time, not "unduly burden[ing] the Government or the applicants with an excessively complex process." 130 Cong. Rec. 17,229 (1984) (remarks of Rep. Mineta).[39] In enacting IRCA's provision barring pre-deportation-order review of "a determination respecting an application for adjustment," 8 U.S.C. § 1160(e)(1), Congress obviously decided to create, for the SAW program, a narrow channel for judicial review of INS' fact-finding and law-application in individual cases.[40] The

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the Senate dropped its broadly worded version precluding review of any "decision or determination under this section," and acceded to the House version.

[39] Had Congress made no express provision concerning judicial review, under the Administrative Procedures Act, an alien denied SAW status could probably have proceeded to district court immediately to contest the denial, with an appeal to the court of appeals thereafter. Then if the courts sustained the denial and the INS subsequently commenced deportation proceedings against the alien, the alien could still litigate his deportability before an immigration judge, followed by appeal to the Board of Immigration Appeals ("BIA"), and then judicial review again, this time before the court of appeals in accordance with INA § 106(a). The clear intent of § 1160(e) is to reduce delay and possible manipulation by ensuring that the court of appeals only has to review the alien's case once, by delaying review until all possible defenses or claims for relief from deportation have received final administrative resolution.

[40] The legislative history shows that not only did Congress not intend to preclude class action lawsuits such as this one, but also that Congress understood the term "a determination respecting an application" to refer to an individual adjudication. The Senate bill limited applicants to a single level of administrative appellate review "of a final determination respecting an application for adjustment of status." S. 1200, § 202(f)(4). Like the House version ultimately adopted, such review would be based solely upon "the administrative record established at the time of the determination on the application." *Id.* That Senate provision was in addition to § 202(f)(1), which as discussed

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exercise of jurisdiction over this case is in no way inconsistent with that goal.[41]

Moreover, Congress created IRCA's judicial review provisions against a well-established background of existing case law holding that 8 U.S.C. § 1105a does not preclude broad-based statutory and constitutional challenges. *See, Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (5th Cir. Unit B 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986).[42] When adopting a new law

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previously, precluded review of any "decision or determination under this section." *Id.*, § 202(f)(1). Thus, when the Senate dropped its comprehensive preclusion and agreed to retain only the more limited one involving "determination[s] respecting an application," it must have surely known that the abandonment contemplated the possibility of judicial review of decisions and determination outside the ambit of individual adjudications. Further support for this view is found in comparing the committee reports of the two houses. The Senate report accompanying S. 1200 stated that the preclusion attached to "a decision or determination made with respect to *the legalization program*." S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985). By contrast, the House Committee Report stated that the language ultimately adopted by Congress provided for limited administrative and judicial review of *denials of applications for legalization*. H.R. Rep. No. 682, *supra*, Pt. 1 at 74.

[41] Petitioners think it is "peculiar" that the court of appeals would hear "less important individual cases" while the district courts would review the "much more important cases involving broad questions that would apply to a whole class of aliens." Of course, as this very case demonstrates, the courts of appeal are available to review "the most important cases." Moreover, the division of labor between the appellate and district courts is generally thought to turn on considerations such as the necessity for fact-finding, rather than which court is "more important." In any case, permitting respondents' district court actions is the result that is most "consistent both with Congress' intentions and with the terms by which it has chosen to express those intentions." Cf. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 217-18 (1968).

[42] *See also, NCIR, Inc. v. INS*, 743 F.2d 1365 (9th Cir. 1984), *vacated on other grounds*, 107 S.Ct. 1881 (1987) (8 U.S.C. § 1252(a) does not bar district court jurisdiction where no review of any individual bond determination is sought); *International Union of Bricklayers v. Meese*, 761 F.2d 798,

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incorporating sections of a prior law, Congress can be presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985), and to adopt the interpretation when it incorporates the prior law without change. *Id.*

The very fact that Congress implemented judicial review of legalization denials through the pre-existing statutory structure of 8 U.S.C. § 1105a – without further restriction or of change to that section – establishes that Congress did not seek to alter legislatively the case law on § 1105a with respect to IRCA.

F. The Paramount Role Of The Political Branches In Immigration Matters Claimed By Petitioners Has No Applicability Here

As a last resort, the petitioners argue that judicial review by respondents "is particularly inappropriate in light of the paramount role of the political branches in immigration matters." Pet. Br. at 31. This argument is without merit for several reasons. Immigration matters are not different. This Court has long recognized the presumption of judicial review in immigration matters. *Rusk v. Cort*, 369 U.S. 367 (1962); *Brownell v. We Shung*, 352 U.S. 180 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955). Second, respondents challenge procedural deficiencies on constitutional grounds, not substantive determinations of admissibility or excludability. *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the government must respect the procedural safeguards of due process"). *See also, Landon v. Plasencia*, 459 U.S. 21, 32

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801 (D.C. Cir. 1985) (doctrine of nonreviewability of consular decisions is not applicable where plaintiffs do not challenge a particular decision in a particular case of matters which Congress has left to executive discretion but challenge the underlying procedures).

(1982); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Gegiow v. Uhl*, 239 U.S. 3 (1915).

The petitioners' attempt to draw a distinction here between persons who are residents and those who have not yet obtained residency is particularly without force because "in enacting the Special Agricultural Worker program, Congress and the Executive Branch have granted aliens a constitutionally protected right to apply for temporary residency as well as the right to substantiate their claims for eligibility. . . . Once Congress chooses to create such a system of entitlements and promulgates rules which restrict the discretion of administrative offices to grant benefits under the system, a property interest is created that is accorded procedural due process protection. *See, Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972)." Pet. App. 14a.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed in all respects.

Respectfully submitted,

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No. 89-1332

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Our central submission in this case is that the Immigration Reform and Control Act of 1986 (IRCA) precludes district courts from exercising general jurisdiction over "pattern and practice" allegations in the SAW program. Respondents and their amici dispute this proposition on three principal grounds. First, they contend that the opportunity Congress provided for judicial review of SAW denials—in the context of a deportation or exclusion order—is not adequate to address their claims and thus IRCA must be construed to permit those claims to be asserted in district court. They argue, next, that despite the broadly framed application of IRCA to any "determination respecting" an application, the language of the statute does not apply to *their* challenges, which are purportedly directed only at policies and practices affecting many applications. Finally, they contend that a variety of policy considerations support the allowance of pattern and practice cases in addition to the individual challenges to SAW denials that IRCA exclusively authorizes.

At bottom, these contentions rest on the view that the case-by-case system of review provided by IRCA is inadequate to serve the goal of litigating thousands of SAW applicants' claims in district court class actions. But the logic of respondents' arguments is not limited to "pattern and practice" claims. Rather, respondents' arguments, if accepted, would dictate a holding that the entire system of judicial review under IRCA is invalid; essentially the same hurdles to judicial review attacked by respondents apply to any individual who believes that his application was wrongfully denied. Whatever the merits of respondents' views as a policy matter—and we disagree with respondents on that point—Congress determined to put significant restrictions on the judicial review available to SAW applicants, and these restrictions are directly applicable here.

1. Respondents' principal contention (Br. 18-32) is that notwithstanding the explicit review process provided in 8 U.S.C. 1160(e), the statute must be construed to leave open district court "pattern and practice" actions. In their view, the courts of appeals cannot provide an adequate forum for raising their constitutional claims; therefore, district court jurisdiction is essential to avoid "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). That speculative contention should be rejected.

a. Respondents initially argue that the statutory opportunity for judicial review is inadequate because in order to obtain review, SAW applicants must be placed in deportation proceedings (and undergo any associated hardships of arrest and detention); moreover, since INS has prosecutorial discretion not to institute deportation proceedings, an applicant cannot be assured of obtaining judicial review at all. Br. 24-26. If respondents are correct that the deportation-order requirement as a prerequisite for judicial review renders "illusory" the opportunity for review (Br. 24, 32), any disappointed SAW applicant

—not just "pattern" plaintiffs—must be permitted immediately to file an action in district court. The alternative would be for the rejected applicant to present himself for deportation, await the outcome of that process, and seek review as provided in the statute—precisely the alternative available to class members here. The number of applicants affected by this case does not alter the nature of the claimed obstacles to obtaining review.[1]

This Court should not invalidate IRCA's entire framework for review on the basis of respondents' hypothetical claims of hardship. Respondents have not followed the route for judicial review provided by the statute and therefore are compelled to speculate about the adequacy of the statutory review process. Nothing in the record indicates how the process will actually work for aliens who wish to obtain deportation orders for the purpose of testing the denial of a legalization application. Cf. *Yakus* v. *United States*, 321 U.S. 414, 435 (1944). Although, as respondents state (Resp. Br. 25-26), it is theoretically possible that INS could prevent an alien from obtaining review under IRCA by declining to institute deportation proceedings, there is no indication INS has ever taken such an unusual step, and no reason to assume it will ever do so.[2] If INS were to prevent resort to the statutory

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[1] Indeed, respondents' position has implications for other provisions of the immigration laws, since judicial review of immigration claims is often deferred until entry of a deportation order. Cf. *Jain* v. *INS*, 612 F.2d 683, 689 (2d Cir. 1979) (rejecting a claim that an alien was "denied due process because he was unable to appeal the original denial of his section 245 application [for adjustment of status] and could only do so in the context of deportation proceedings"), cert. denied, 446 U.S. 937 (1980); *Kashani* v. *Nelson*, 793 F.2d 818, 826-827 (7th Cir.) (requiring rejected asylum applicant to renew his asylum claim in deportation proceedings before seeking judicial review), cert. denied, 479 U.S. 1006 (1986).

[2] Nor is work authorization categorically unavailable to an alien desiring to be put in deportation proceedings in order to test a legalization denial. See Resp. Br. 26. Although an alien whose SAW application is finally denied will lose the mandatory work authorization afforded by IRCA, see 8 U.S.C. 1160(d)(2), an

forum for review by refusing to initiate deportation proceedings, the time would then be ripe to consider whether IRCA's system for review, on the particular facts, deprived an alien of an adequate opportunity for judicial review, and, if so, whether that deprivation was unconstitutional. No such claim is presented here.

Contrary to respondents' contention, *Rusk* v. *Cort*, 369 U.S. 367 (1962), does not support the conclusion that the perceived obstacles to review under IRCA require immediate judicial review in district court. Resp. Br. 25; see also AFL Amicus Br. 23. The Court in *Rusk* held that the procedures of 8 U.S.C. 1503(b) and (c) (which permitted a person living overseas and claiming United States citizenship to obtain a certificate of identity, travel to the United States, and present his citizenship claim in INS exclusion proceedings) were not exclusive; thus, a person who remained abroad could bring a declaratory judgment action to challenge an administrative ruling divesting him of citizenship. 369 U.S. at 379. The Court's holding was not based on the possible hardship to an individual seeking to establish his citizenship through the statutory process; rather, the decision responded to the permissive language of the statute, which stated that a person "'*may*' apply for a certificate of identity and that a holder of a certificate of identity '*may*' apply for admission to the United States." The Court explained that those provisions "show[] no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c)." *Rusk*, 369 U.S. at 375. IRCA, in contrast, *requires* that review take place only under 8 U.S.C. 1105a after the entry of an appropriate order.[3]

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alien placed in deportation or exclusion proceedings can request INS to exercise its discretion to grant temporary work authorization. 8 C.F.R. 274a.12(c)(13). Although INS is not required to provide work authorization in that setting, the existing regulations provide avenues for aliens to seek relief.

[3] Moreover, the holding in *Rusk* was supported by the fact that the purpose of 8 U.S.C. 1503(b) and (c) was to prevent a person

In evaluating respondents' objections to IRCA's deportation-order requirement, it is critical to understand the legal context in which Congress acted. The requirement that judicial review be limited to SAW applicants confronted with a deportation or exclusion order was adopted in response to an "extremely complex" problem: "[H]ow to offer millions of people an unprecedented benefit, guarantee confidentiality to induce them to apply for that benefit, turn the process over to an overburdened agency and avoid filling the federal courts with thousands of appeals."[4] Congress's resolution of that problem reflects the underlying tension between IRCA's two principal objectives: to offer legalization to the large population of illegal aliens who have lived in the United States for many years and who have put down deep roots in our society, but to curtail illegal immigration into the United States by removing incentives for illegal aliens to be here. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 45-49, 56-58, 71-72 (1986). To discourage illegal aliens from coming to this country, Congress imposed sanctions on employers who hire aliens lacking proper authorization to work. See 8 U.S.C. 1324a; H.R. Rep. No. 682, *supra*, Pt. 1, at 46, 56. And, although not specifically aimed at illegal aliens already present in this country, the inevitable effect of the employer sanctions program was to make it more difficult

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from entering the United States under a false claim of citizenship and then "disappear[ing] into the general populace"; that congressional purpose had no application to a person willing to remain outside the United States while his citizenship was determined. 369 U.S. at 377-379. Here, in contrast, Congress's purposes in limiting judicial review would plainly be frustrated if aliens could circumvent Section 1160(e) by claiming that they would experience undue hardship if forced to obtain a deportation order before seeking judicial review.

[4] Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives To Get Into Court?*, 25 Harv. C.R.-C.L. L. Rev. 53, 68-69 (1990) (footnote omitted).

for illegal aliens who did not qualify for legalization to continue living illegally in the United States.[5]

Against that background, the requirement much criticized by respondents—that an alien desiring judicial review of his legalization denial must invite entry of a deportation order—"simply mirrors the duality of purpose that runs all through IRCA."

> IRCA's aim was not to maximize the range of legal opportunities open to undocumented aliens. Instead, its major objective is best understood as bringing an end to the ongoing limbo of undocumented status—in one of two ways. Those who qualify for legalization are invited to surface and become legal, fully functioning members of the society. Those who do not qualify are essentially told to leave, because the U.S. is going to get serious about enforcement of immigration laws. The principal manifestation of that seriousness is of course employer sanctions, which are meant to dry up job opportunities for those illegally in the country, ultimately persuading them to return to their homelands voluntarily. * * * Congress's message for the undocumented population is abundantly clear in the basic design of the legislation: Legalize or leave.

Martin, *Judicial Review of Legalization Denials*, 65 Interpreter Releases (Federal Publications) 757, 760 (Aug. 1, 1988) (footnotes omitted). Senator Simpson, a chief sponsor of the immigration reform bill, underscored that "message" of IRCA: "This is a generous Nation responding; instead of going hunting for you and going through

[5] The employer-sanctions program applied prospectively; it did not bar the "continuing employment of an alien who was hired before the date of the enactment of [IRCA]." Pub. L. No. 99-603, § 101(a)(3), 100 Stat. 3372 (1986), set forth at 8 U.S.C. 1324a note. But the sanctions did apply to any new employment, thus making it unlawful for an illegal alien to change jobs. Consequently, the employer sanctions program operated "to discourage illegal immigration into the United States and to make it difficult for undocumented aliens to remain in the country." *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1326 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018.

the anguish of that in the cities and communities of America, this is it. It is one time. You either show up on this one or you will be rejected by the employers because employer sanctions will be in place. Your choice then is to return to wherever you come from * * *." 132 Cong. Rec. 33,218 (1986).[6]

The obstacles of the deportation process for the class members here are thus inherent in the legalization program Congress devised. Of course, Congress could have chosen to make judicial review available sooner, or could have removed the need for an alien to expose his illegal status in order to obtain judicial review of his claim. But to do so, Congress would have had to strike a different balance among its competing immigration policies: to grant legalized status to qualified illegal aliens; to make illegal immigration highly unattractive to illegal aliens; and to provide a fair but limited opportunity for judicial review. Enlarging the range of options for judicial review for the reasons adduced by respondents is fundamentally incompatible with the careful reconciliation of policies effected by Congress.[7]

[6] The confidentiality protections afforded to SAW applicants must be understood in the same light. In order to encourage participation in the SAW program, Congress protected applicants against having their SAW applications used for any purpose other to make a determination on the application (or to enforce the prohibition against filing fraudulent applications). But Congress chose not to extend that protection to a rejected applicant seeking judicial review. Compare 8 U.S.C. 1160(b)(6) with 8 U.S.C. 1160(e)(3)(A). Accordingly, the requirement that an alien give up his anonymity to challenge an INS determination in court is not a reason to interpret the statute to provide some safer means of judicial review (see AFL Amicus Br. 18-20); Congress never intended to cloak judicial review with confidentiality.

[7] Respondents' amici argue that under our approach, aliens who were wrongly prevented by INS or a Qualified Designated Entity from even filing an application would be completely precluded from judicial review because they would never obtain the requisite "denial" of a legalization application. The Farm Labor Alliance *et al.* Amici Br. 15, 19; AFL Amicus Br. 28. As the AFL brief

b. Respondents also contend that their due process claims could not be addressed in the deportation context because the administrative review mechanisms provided under IRCA would not create a sufficient record for the court of appeals. Resp. Br. 27-32; see ABA Amicus Br. 4-6. But both the district court and the court of appeals in this case discussed the need for translators, witnesses, and particularized records of denials at SAW interviews without adverting to any item of evidence that would have been unavailable in a proceeding under Section 1105a. Pet. App. 14a-17a, 49a-52a. The analysis in those opinions demonstrates that constitutional adjudication under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), does not invariably necessitate district court jurisdiction. The *Mathews* factors often can be determined and weighed based on such "legislative facts" as publicly available information about an agency's functions and purposes, its budget constraints, its methods of operation, and the nature of the alternative procedures sought.[8]

Even if a court of appeals found it necessary to amplify a record in order to adjudicate a constitutional

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notes (at 28), that issue does not arise in this case because the class certified includes only aliens "who have applied for, or will apply for," SAW status. Pet. App. 48a. But we see no reason why such a rebuffed applicant could not litigate a claim, in a proceeding to review a deportation order, that he had been improperly thwarted in his effort to apply for legalized status. Cf. *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) (allowing review of "all matters on which the validity of the final order is contingent").

[8] In *Mathews* itself, for example, the case was decided in the lower courts on a motion to dismiss the complaint, and no federal court evidentiary hearing had been held prior to this Court's decision. 424 U.S. at 325-326. Nonetheless, this Court was able to resolve the question presented (whether due process required an evidentiary hearing prior to the termination of disability benefits) by considering a variety of materials describing the operations of the Social Security disability program. *Id.* at 332-349. See also *Califano* v. *Yamasaki*, 442 U.S. 682, 696-697 (1979). A similar approach could readily be employed in evaluating respondents' challenges.

claim, it could accomplish that goal in several ways in full compliance with IRCA. The provision for judicial review under IRCA incorporates 8 U.S.C. 1105a, which makes applicable to the review of deportation orders "[t]he procedure prescribed by, and all the provisions of" the Administrative Orders Review Act,[9] better known as the Hobbs Act. That Act authorizes a court of appeals either to require an agency to reopen its proceedings to take additional evidence, 28 U.S.C. 2347(c),[10] or to transfer proceedings to a district court if an administrative hearing is not required by law and a genuine issue of material fact is presented; such district court proceedings are governed by the Federal Rules of Civil Procedure. 28 U.S.C. 2347(b)(3). Cf. *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 320 (1953). Respondents fail to explain why these alternatives would not generate an adequate record for review of their due process claims.

c. Respondents further contend (Br. 19-22, 41-45) that the organizational plaintiffs must be permitted to sue on broad "pattern" theories because they otherwise would have no means of gaining access to court. See also AFL Amicus Br. 26-28. As our opening brief explained (at 23-26), recognizing such suits would quickly destroy the limited framework for review established by Congress; hence, judicial review at the behest of those or-

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[9] Pub. L. No. 89-554, 80 Stat. 622 (1966), codified at 28 U.S.C. 2341 *et seq.*

[10] Although courts have differed on the applicability of Section 2347(c) to appellate review of deportation orders, compare *Becerra-Jiminez* v. *INS*, 829 F.2d 996, 1001 (10th Cir. 1987), with *Ramirez-Gonzales* v. *INS*, 695 F.2d 1208, 1213 (9th Cir. 1983), a remand would not be inconsistent with IRCA. While 8 U.S.C. 1160(e)(3)(B) limits judicial review to the record established by INS's administrative appeals unit, that unit may supplement the record with "such additional or newly discovered evidence as may not have been available at the time of the [initial] determination." 8 U.S.C. 1160(e)(2)(B). Cf. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).

ganizations is "impliedly precluded." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984).

Respondents' effort to justify organizational suits only confirms that litigation by those plaintiffs disrupts the statutory scheme under IRCA, while preclusion of organizational suits "will not threaten realization of the fundamental objectives of the statute." *Block*, 467 U.S. at 352. Of the variety of institutional interests asserted by the organizational respondents in this case, conspicuously absent is any contention that INS violated *their* due process or statutory rights. See Resp. Br. 10-11 (alleging injuries of loss of reimbursed application fees; depletion of a "reservoir of goodwill and trust"; "internal friction"; "diversion of * * * limited resources"). Rather, the legal claim of the organizational respondents hinges entirely on the theory that the due process rights of *SAW applicants* have been violated. Those rights, however, can be protected through litigation brought by the rejected SAW applicants themselves in the manner that Congress intended.[11] Preclusion of organizational suits will not insulate any constitutional claims from review; but entertaining those claims at the instance of organizational plaintiffs short-circuits and undermines the administrative process that Congress contemplated. See *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1332, 1340 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018.[12]

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[11] The organizational respondents also claim the right to sue as representatives of aliens who have not even applied for SAW status; in respondents' view, such aliens could proceed directly to court without pursuing the administrative process at all. Br. 43 n.36. But those "future" applicants cannot circumvent the administrative process by seeking advisory judicial opinions on questions of law; they too are required to comply with statutory prerequisites for review. *Heckler* v. *Ringer*, 466 U.S. 602, 620-625 (1984).

[12] While respondents seek to dramatize the harm to Qualified Designated Entities (QDEs) (Br. 41) (claiming that the QDEs' "credibility, and thus their effectiveness, was undermined by INS

The argument advanced by amici State of California, *et al.*, illustrates the danger of entertaining "pattern" suits based on alleged injuries-in-fact experienced by entities not subject to deportation or exclusion. California argues (Amici Br. 6-7) that state and local governments "have even greater interests in the proper administration of the SAW program than the organizational Respondents herein"; thus, according to California, such governments must be permitted to sue to complain about alleged unconstitutional actions taken by INS with respect to SAW applicants. Indeed, if Qualified Designated Entities can sue on the basis of the revenue lost because of the SAW applicants whom they turn away (see Resp. Br. 10-11), why should not a State be entitled to bring a similar suit if it will have to bear some expenses as the result of the denial of SAW applications? Why not an employer who claims to have lost access to a pool of qualified labor? Those claims have the same analytical underpinnings as the organizational respondents' claims; but if they are recognized, IRCA's limitations on judicial review will soon collapse under a wide array of claims by non-aliens.

2. Not only do respondents fail to establish that review of their claims is unavailable as a practical matter under 8 U.S.C. 1160(e)(3), they also fail to overcome the text of IRCA, which expressly precludes district court jurisdiction over this action. As explained in our opening

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conduct which rendered their advice and counsel worthless"), they offer no evidence that Congress intended QDEs to be omniscient advisers, rather than counselors about INS's policies. IRCA itself suggests the latter, more modest role. The QDEs were expressly precluded from making determinations required to be made by the Attorney General, 8 U.S.C. 1160(b)(4), and cooperative agreements between INS and the QDEs required them to "comply with all relevant INS regulations relating to the legalization . . . programs." *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d at 1339. There is no reason why requiring QDEs to transmit accurate advice about INS's policies (as well as permitting QDEs to provide independent advice about the validity of those policies) interferes with the function of QDEs under the statute.

brief (at 17-22), IRCA provides that "[t]here shall be *no* administrative or judicial review of *a determination respecting an application* for adjustment of status under this section except in accordance with this subsection"; the subsection then authorizes judicial review of SAW denials exclusively in the review of an exclusion or deportation order. 8 U.S.C. 1160(e)(1) and (e)(3)(A) (emphasis added). Respondents and their amici seek to avoid this bar by contending that the statutory language does not apply to "pattern and practice" cases. Resp. Br. 32-33; AFL Amicus Br. 5-11; ABA Amicus Br. 7-9. Contrary to respondents' contention, the language of IRCA does not cease to apply whenever the reasons underlying the denial of a SAW application can be characterized as a general policy or agency practice.

A natural reading of IRCA's preclusion provision covers claims that an unconstitutional policy or procedure has been applied in adjudicating an application—precisely the type of claim advanced here.[13] For example, if INS's policy of failing to pay for an interpreter resulted in the denial of SAW status, then the policy's application to a particular applicant would constitute a "determination respecting" an application. Further, a

[13] Although respondents disclaim the intention of seeking reversal (or even review) of any particular claim (*e.g.*, Br. 12-13, 18-19, 21-22, 33), the district court plainly understood otherwise, as it ordered the reopening of thousands of such claims. Pet. App. 56a. Of course, the vacation of a denial, the reopening of a claim, and the requirement of additional agency proceedings constitutes "reversal" of the agency's determination. Cf. *Sullivan* v. *Finklestein*, 110 S. Ct. 2658, 2664 (1990). Indeed, it is inescapable that respondents sought to challenge individual denials; the "irreparable harm" alleged to justify preliminary injunctive relief was based on those very denials. Resp. Br. 22. And respondents cannot avoid the jurisdictional implications of those reversals by pointing out that INS did not specifically appeal those reopenings. Contrary to respondents' view (Br. 7 n.4, 22 n.8), we did challenge the jurisdiction of the district court over the entire case, not just the paragraphs of the injunction under appeal. See Gov't C.A. Br. 14; Gov't C.A. Reply Br. 2.

court of appeals, in the review of a deportation order, could evaluate the constitutionality of the INS policy in the course of reviewing the particular decision before it. That approach to judicial review accords with fundamental principles of administrative law. Under the Administrative Procedure Act, subsidiary questions of law that support agency action are reviewable together with the ultimate determination. See 5 U.S.C. 704; S. Doc. No. 248, 79th Cong. 2d Sess. 255 (1946) (agency action "includes the supporting procedures, findings, conclusions, or statements of reasons or basis for the action"). The same principles guide judicial review in immigration cases. See *Foti* v. *INS*, 375 U.S. 217, 229 (1963) (court of appeals' jurisdiction under 8 U.S.C. 1105a includes "all determinations made during and incident to the administrative proceeding"); *INS* v. *Chadha*, 462 U.S. 919, 938 (1983). As a general matter in entitlement programs, courts determine the validity of agency rules of broad application in the course of reviewing particular claims. See, *e.g.*, *Heckler* v. *Campbell*, 461 U.S. 458, 465 (1983) (Social Security Act); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988) (Black Lung Benefits Act). Policies and rules under IRCA are reviewable in a similar fashion.[14]

[14] Respondents rely heavily (Br. 19) on *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), to suggest that limits on review of "determinations" do not apply to "procedures," but they fail to respond to our argument that *Michigan Academy*'s reading of the statute at issue was driven by the need to ensure *some* judicial forum for constitutional claims arising under Part B of the Medicare Program (see *id.* at 681 n.12; Gov't Br. 22). Moreover, *Michigan Academy* is inapposite for the additional reason that the language construed in that case (a "determination *of* the amount of benefits") is far narrower than IRCA's coverage of a "determination *respecting* an application." Nor do respondents succeed in distinguishing *Heckler* v. *Ringer*, 466 U.S. 602, 614 (1984), where, in considering a claim analogous to respondents' claims, the Court characterized "objections to the Secretary's 'procedure' for reaching her decision" as "'inextricably intertwined' with respondents' claims for benefits" and therefore

Accordingly, IRCA's use of the singular form to describe the INS decisions governed by its restrictions on judicial review ("a determination"; "an application"; "such a denial") does not suggest that Congress somehow intended to exempt challenges to program-wide policies from limitations on review. See Resp. Br. 33; AFL Amicus Br. 5-6. General policies, when applied in particular cases, are "determination[s] respecting" an application (see *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d at 1331); review of them is therefore limited and channelled by IRCA. The use of singular terms in the statute is in keeping with Congress's intent to require judicial review on a case-by-case basis, rather than at the "program" level.[15]

Respondents also argue that because several lower courts have construed the general immigration provision governing review of deportation orders (8 U.S.C. 1105a) not to preclude "practice[] and procedure[]" cases, Congress necessarily adopted that interpretation of the law

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required to "be channeled first into the administrative process which Congress has provided." Respondents are simply wrong in stating that *Ringer* has been treated as dealing only with review of an "amount determination." Br. 19-20, citing *Michigan Academy*, 476 U.S. at 677 n.7. In the *Michigan Academy* footnote cited by respondents, the Court addressed only "the fourth footnote in *Heckler* v. *Ringer*" (which dealt with Part B of the Medicare Program), not the balance of the opinion (which dealt with Part A) on which we rely.

[15] Despite respondents' extensive discussion (Br. 45-49) of the legislative history, they provide no direct evidence that the purpose behind Section 1160(e) was *solely* to restrict judicial review of individual claims in order to prevent hundreds of disappointed applicants from flooding the federal courts. The House Report does not say this. It states that the proposed bill "[p]ermits judicial review of such denial *only* within the context of the review of an order of deportation." H.R. Rep. No. 682, *supra*, Pt. 1, at 96 (emphasis added). The background from which this provision emerged —one in which the competing Senate bill precluded judicial review in any form—suggests that Congress understood that it was authorizing this limited type of review and none other. Gov't Br. 15-17.

when it made Section 1105a applicable to the review of SAW denials. Resp. Br. 34-35 & n.23;[16] AFL Amicus Br. 9-10. As an initial matter, respondents are mistaken in claiming (Br. 35) "direct evidence that Congress knew of and endorsed procedural and policy challenges, such as those here." The fragment of legislative debate cited by respondents (Br. 35 n.23) relates to a provision that applied to asylum (not SAW) applications and that was never enacted by Congress. The colloquy reflects, at best, the beliefs of two individual Senators about proposed language that differed sharply from that employed in IRCA itself. More fundamentally, although Congress is presumed to adopt prevailing interpretations of existing statutes when it incorporates prior provisions without change, *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985), that presumption does not apply here. First, IRCA provides that there shall be judicial review *"under* section 1105a" (emphasis added); that formulation does not authorize review pursuant to judicially created *exceptions* to that provision. Second, even if Section 1105a allows exceptions, IRCA goes farther and expressly bars any other forms of review. 8 U.S.C. 1160(e)(1). Accordingly, IRCA itself precludes extension to the legalization context of the debatable "pattern and practice" decisions under Section 1105a.

3. Finally, respondents rely (Br. 38-41) on various policy considerations that are said to demonstrate the wisdom and efficiency of allowing wholesale pattern or practice challenges. These policy arguments are essentially premised on the idea that district court class actions will enable more aliens to achieve legalization, thus promoting Congress's goal of providing a "generous program." Resp. Br. 39, quoting H.R. Rep. No. 682, *supra*,

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[16] Respondents place (Br. 34-35) particular emphasis on 8 U.S.C. 1329 (a general jurisdictional provision under the immigration laws), but they do not explain why this provision is any more relevant than 28 U.S.C. 1331, on which the "pattern and practice" cases principally relied. See Gov't Br. 27.

Pt. 1, at 49. But it is not the case that any interpretation of the statute that furthers the goal of increasing participation in the legalization program serves Congress's purposes. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). In this case, empowering the district courts to supervise INS procedures under the guise of "pattern and practice" suits entails costs both for the sound development and application of immigration policy and for the workload of the federal courts—costs that Congress did not authorize.

Wide-ranging district court actions, in which the courts exert their claimed power of review to arrogate to themselves large parts of the administration of the legalization effort, have been neither efficient, beneficial, nor consistent with the congressional purpose. Even though some objections raised in those cases have been valid ones, the net effect of litigation under IRCA has been to impose a virtual receivership on INS operations, with federal judges overseeing the process; that consequence is vividly illustrated by the discussion of cases in The Farm Labor Alliance *et al.* Amici Brief. See also Gov't Br. 30-31. As in other contexts, "the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program * * * are not unlimited." *Mathews*, 424 U.S. at 348.

In contrast, the approach required under IRCA focuses review on particular cases. Under IRCA's regime, legal questions can be considered without converting district courts into INS administrators. Respondents and their amici repeatedly assert that IRCA, if construed as we

suggest, will deluge the courts of appeals with thousands of legalization cases that could be resolved more efficiently in district court class actions. Resp. Br. 41; AFL Amicus Br. 11-17; ABA Amicus Br. 10-16. That suggestion, not borne out by experience, is entirely chimerical. The approach Congress required—of confining challenges to individual orders of deportation or exclusion—does not require numerous individual appeals to establish a proposition of law affecting thousands of applicants. INS, like other federal agencies, appreciates the value of test cases on issues of law. If a court of appeals decides an issue adversely to INS, and the Solicitor General determines not to seek further review, the agency is prepared to acquiesce in that decision on a circuit-wide basis. Indeed, if it is determined that INS does not intend to seek contrary rulings in other circuits in order to facilitate review by this Court, INS is prepared to acquiesce in adverse rulings nationwide.[17]

Respondents urge that their "pattern" cases are efficient because they encompass "broad policies or practices applicable to all cases" (Br. 34) including future applications not even filed (*id.* at 6). But those contentions, if credited, only highlight the similarity between respondents' approach to reviewing agency action and the approach to reviewing an agency "program" that the Court rejected last Term in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3191 (1990).[18]

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[17] An example of this process is the recent decision in *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990). There, the court of appeals reversed the denial of a legalization application on the basis that INS's Legalization Appeals Unit had committed legal error in holding that an alien whose plea of guilty was subject to "deferred adjudication" had been "convicted of any felony" under 8 U.S.C. 1255a(a)(4)(B). INS has advised us that it will not seek authorization for further review of this ruling, and that it will, sua sponte, have the Legalization Appeals Unit reopen its appellate cases, nationwide, in which denials were based on the same issue of law.

[18] Contrary to respondents' contention (Br. 37 n.26), our reliance on *Lujan* (a case not decided when the Court granted the

Respondents struggle to distinguish *Lujan* by asserting that the "procedures, policies, and practices challenged here * * * are described with precision and particularity." Br. 38 n.28. But the point of *Lujan* was not that general policies may lack sufficient specificity to enable review; rather, the point is that across-the-board policy challenges—no matter how specifically "described" —are not reviewable in the abstract, before those policies are applied in particular cases. Even a regulation (perhaps the paradigm of a specifically described policy) "is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan*, 110 S. Ct. at 3190. As in *Lujan*, respondents find this "case-by-case approach * * * understandably frustrating." *Id.* at 3191. Nevertheless, Congress did not authorize district court review of free-floating INS policies disconnected from their application in a particular proceeding. In an individual case, a court can better discern the practical implications of an INS policy—as well as the specific impact of that policy on the rejection of a particular claim. That ensures that courts will set aside agency action only for those errors that actually work prejudice to an applicant. If individual SAW applicants wish to challenge their legalization denials—and the policies that support those determina-

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petition here) is not beyond the scope of the question presented in this case. *Lujan* underscores our statutory argument because it indicates that even absent IRCA's preclusion provision, respondents' claims (if treated as challenging policies independent of particular determinations) would be unreviewable. It makes little sense to construe a statute to permit APA review of asserted "agency action" when conventional administrative law principles establish that the challenged agency action is unreviewable in the first place.

tions—they must adhere to the system for review that Congress has provided.

* * * *

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1990

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In the Supreme Court of the United States

OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, *et al.*,
Petitioners,

v.

HAITIAN REFUGEE CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international labor organizations with a total membership of 14 million working men and women, files this brief *amicus curiae* in support of respondents Haitian Refugee Center *et al.* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

Petitioners' argument that Congress intended the specialized review provisions of 8 U.S.C. § 1160(e) to divest federal district courts of their jurisdiction, under 28 U.S.C. § 1331 and 8 U.S.C. § 1329, to review constitutional or statutory challenges to the Immigration and Naturalization Services' ("INS") regulations and policies implementing the legalization provisions of the Immigration Reform and Control Act of 1986 ("IRCA") is unsound, as we show in a four-part argument.

In Part I, we examine the plain language and structure of 8 U.S.C. § 1160(e), showing that Congress intended IRCA's specialized review provision to encompass only individual, fact-based denials of legalization applications. This is demonstrated by Congress' use of the term "determination," its singular reference to "an" application, its narrow "abuse of discretion" standard of judicial review and its express incorporation of 8 U.S.C. § 1105a, which has consistently been construed by the courts as *not* precluding district court jurisdiction over legal challenges to INS policies and regulations. Pp. 5-11, *infra.*

In Part II, we show that the policies underlying IRCA's specialized review provision are *furthered* by permitting district court review of legal challenges to the INS' legalization policies, because the availability of injunctive relief at the start of the statutory application period allows for prompt resolution of such chal-

lenges, which otherwise would overwhelm the administrative and judicial system if individually litigated with no right of judicial review until an order of deportation has issued. Pp. 11-17, *infra*.

In Part III, we demonstrate that petitioners' contrary approach conflicts with Congress' policy of encouraging eligible aliens to apply for legalization by promising them confidentiality in their applications and employment authorization if the applicant can demonstrate *prima facie* eligibility and thereby compromises the ability of such aliens to obtain lawful employment pending final adjudication of their applications. Pp. 18-22, *infra*.

Finally, in Part IV, we show that petitioners' burden is to provide clear and convincing evidence of a congressional intent to include legal challenges to INS policies and regulations within the compass of IRCA's specialized review provision, not only because of the substantial procedural hurdles that petitioners' approach would place on aliens seeking review of such policies and regulations, but also because that approach would preclude judicial review altogether for many categories of claimants—including Qualified Designated Entities, individual aliens who were prevented from filing legalization applications because of the INS's unlawful legalization policies and individual aliens who were denied employment authorization based on such unlawful policies during the lengthy pre-application period. Pp. 22-30, *infra*.

ARGUMENT

Shortly after the enactment of the Immigration Reform and Control Act of 1986, petitioners adopted a series of regulations and policies implementing the legalization provisions of that Act. Many of those regulations and policies were successfully challenged in federal district court lawsuits for injunctive and declaratory relief, often on a class-wide basis.

The district courts asserted jurisdiction over those suits under 28 U.S.C. § 1331 (federal question jurisdiction) and/or 8 U.S.C. § 1329 (jurisdiction over "all causes . . .

arising under any of the provisions of" the subchapter of the Immigration and Nationality Act ("INA") that came to include IRCA).[1]

[1] In the great majority of these cases, plaintiffs prevailed on the merits and obtained injunctive relief prior to the deadline for filing legalization applications—which for regular applicants was May 4, 1988 and for SAW applicants was November 30, 1988. *See, e.g., Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 700 F. Supp. 49 (D.D.C. 1988), *vacated in part*, 880 F.2d 1325 (D.C. Cir. 1989), *pet. for cert. pndg.*, No. 89-1018 (enjoining INS regulation that denied eligibility under "known to the government" standard of 8 U.S.C. § 1255a(2)(B) to persons whose unlawful status was known to agencies other than the INS or whose unlawful status resulted from failure to file periodic address reporting forms); *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987) (same re known to other agencies); *Immigrant Assistance Project v. INS*, 709 F. Supp. 998, 717 F. Supp. 1444 (W.D. Wash. 1989), *appeal stayed pndg. McNary decision*, Nos. 89-35345, 89-35593 (same re address reporting forms); *Catholic Social Services, Inc. v. Thornburgh*, 664 F. Supp. 1378 (E.D. Cal. 1987), *appeal of subsequent order stayed pndg. McNary decision*, Nos. 88-15046, 88-16127, 88-15128 (9th Cir. 1990) (enjoining INS regulation that denied eligibility to aliens who traveled outside the country after November 6, 1986 without obtaining advance permission from the INS); *LULAC v. INS*, No. 87-4757-WDK (C.D. Cal. 1988), *appeal stayed pndg. McNary decision*, No. 88-15046 (9th Cir. 1990); (enjoining INS regulation that denied eligibility to aliens who traveled outside the country and returned with a visa prior to November 6, 1986); *Zambrano v. INS*, No. S-88-455 (E.D. Cal. 1988), *appeal stayed pndg. McNary decision*, Nos. 88-15438, 88-15533 (enjoining INS regulation that denied eligibility to aliens if an immediate family member received "public cash assistance"); *Perales v. Meese*, 685 F. Supp. 52 (S.D.N.Y. 1988) (same); *Vargas v. Meese*, 682 F. Supp. 591 (D.D.C. 1987) (enjoining INS regulation requiring SAW applicants filing from within the United States to have entered country before June 26, 1987); *see also Doe v. Nelson*, 703 F. Supp. 713 (N.D. Ill. 1988) (court has jurisdiction over challenge to INS regulation barring legalization applications by aliens apprehended by the INS unless they filed within 30 days after start of application period); *United Farmworkers v. INS*, No. 87-1964-LKK (E.D. Cal. 1988) (settlement of challenge to INS procedures for adjudicating SAW applications in parallel case to *HRC v. McNary* for Northern and Western regions of INS). In many of those cases, the INS either entered into settlement agreements as to one or all of the claims asserted (*e.g., Catholic Social Services, United Farm-*

The common theme among these cases was that *all* challenged, on constitutional or statutory grounds, substantive or procedural policies that the INS had instructed its Legalization Offices ("LOs"), Regional Processing Facilities ("RPFs") and Legalization Appeals Unit ("LAU") to follow in adjudicating individual legalization applications. In *none* did plaintiffs seek a determination on a discrete legalization application. Rather, plaintiffs sought only to assure that their legalization applications *would be administratively adjudicated* under standards that were constitutionally valid and statutorily correct.

Petitioners argue that 8 U.S.C. § 1160(e) was intended to divest the district courts, in the legalization context, of their traditional jurisdiction over legal challenges to INS regulations and policies. Petitioners are wrong. For the reasons set forth below, we submit that the Eleventh Circuit in the present case and the district courts in the cases cited *supra* at p. 3 n.1 properly construed 8 U.S.C. § 1160(e)—and its jurisdictional counterpart for non-SAW legalization applicants, 8 U.S.C. § 1255a(f)[2]—as not precluding district court jurisdiction over challenges to the INS' legalization policies. Even if petitioners were not required to demonstrate "clear and convincing evidence" of Congress' intent to divest the district courts of their traditional jurisdiction over such challenges—and in Part IV we show that petitioners do have that burden—the plain language and structure of IRCA's specialized review provisions and the legislative policies those provisions were designed to further establish that the district courts do have jurisdiction over such challenges.

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workers), or did not appeal the merits as to one or more such claims (*e.g., Ayuda, LULAC, Zambrano, Catholic Social Services, Immigrant Assistance Project*).

[2] 8 U.S.C. § 1160(e)(1) is the specialized review provision governing review of legalization applications filed by Special Agricultural Workers ("SAWs"). IRCA establishes a nearly identical review procedure for legalization claims by applicants other than SAWs in 8 U.S.C. § 1255a(f)(1). Our analysis in the text applies equally to both sections.

I. THE PLAIN LANGUAGE AND STRUCTURE OF IRCA'S SPECIALIZED REVIEW PROVISION DEMONSTRATE THAT CONGRESS DID NOT INTEND THAT PROVISION TO ENCOMPASS LEGAL CHALLENGES TO THE INS' REGULATIONS AND POLICIES.

1. The scope of IRCA's specialized review provision on which petitioners rely is far narrower than petitioners would have it; by its terms, 8 U.S.C. § 1160(e)(1) encompasses only individual, case-by-case review of legalization denials:

> There shall be no administrative or judicial review of *a determination respecting an application* for adjustment of status under this section except in accordance with this subsection. [Emphasis supplied].

The limiting references to "a determination" and "an application" demonstrate Congress' intent to encompass within this specialized review procedure only fact-based challenges to the denial of individual legalization applications.

The first term, "a determination," has long been equated with adjudicative rather than legislative decisionmaking. For example, in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), this Court upheld district court jurisdiction over a challenge to regulations promulgated under part B of the Medicare program, notwithstanding the specialized review provision in 42 U.S.C. § 1395ff(b)(1)(C) covering "any determination . . . as to . . . the amount of benefits," which limits district court review of such a determination. *Bowen* did so on the ground, *inter alia*, that this Medicare review provision "simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (emphasis in original).[3]

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[3] *See also id.* at 679 n.8 (rejecting the Government's argument that the challenged regulation is a "decision of the Secretary" within the meaning of 42 U.S.C. § 405(h)).

Similarly, the statutory reference in 8 U.S.C. § 1160(e) to "an application," in the singular, speaks the language of case-by-case adjudication rather than wholesale rulemaking. The same is true of the specialized review provision as a whole.[4]

Giving these terms their accepted common sense meaning, 8 U.S.C. § 1160(e) cannot be stretched to encompass legal challenges to the INS' underlying legalization policies, which have a widespread impact upon *all* applicants and potential applicants for legalization.[5] Simply stated, such legal challenges can be adjudicated wholly without reference to the disposition of any particular individual's legalization application.

Had Congress intended 8 U.S.C. § 1160(e) to be more broadly inclusive, statutory language to plainly express such an intent was readily at hand. For example, Congress could have modeled 8 U.S.C. § 1160(e) on the more expansive language of 8 U.S.C. § 1329—the general grant of district court jurisdiction under Title II of the INA—by channeling into IRCA's specialized legalization review procedures "all causes . . . arising under any of the provisions of [the legalization program]." Or Congress could have modeled IRCA's specialized review provision on 38

[4] *See, e.g.*, 8 U.S.C. § 1160(e)(2)(A), § 1255a(f)(3)(A) (mandating a single level of administrative review of "*such* a determination") (emphasis supplied); 8 U.S.C. § 1160(e)(2)(B), § 1255a(f)(3)(B) ("such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on *the* application. . . .") (emphasis supplied); 8 U.S.C. § 1160(e)(3), § 1255a(f)(4)(A) ("There shall be judicial review of *such a denial* only in the judicial review of an order of exclusion or deportation under Section 1105a of this title") (emphasis supplied); H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1 at 74 (1986) ("The bill provides for limited administrative and judicial review of denials of applications for legalization.").

[5] *See Ayuda, Inc. v. Thornburgh, supra*, 880 F.2d at 1349 (Wald, C.J., dissenting) ("To the ordinary reader, . . . this phrase . . . appears to cover only the determinations that are made with respect to each application . . . .").

U.S.C. § 211(a), which governs review of veterans' benefits claims, by broadly referring to "[review] on any question of law or fact under [the legalization program]." Or at the very least, Congress could have adopted the Senate's original version of this language, which broadly referred to "review (by class action or otherwise) of a decision or determination under this section." But Congress chose none of these readily available options, and indeed, the Senate's proposed language was expressly *rejected* in Conference.[6]

2. The statutory language of IRCA's remaining judicial review provisions buttresses the foregoing reading of 8 U.S.C. § 1160(e)(1). Thus, 8 U.S.C. § 1160(e)(3)(B) provides that judicial review

> *shall be based solely upon the administrative record* established at the time of the review by the appellate authority and *the findings of fact and determinations contained in such record shall be conclusive* unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and

[6] As explained by the Senate Judiciary Committee, this broad language was intended to preclude all "judicial review of a decision or determination made with respect to the legalization program." S. Rep. No. 132, 99th Cong., 1st Sess. at 48 (1985).

The reference to "this section" in the Senate bill had the effect of including within the ban on judicial review the statutory provision in that section of the Act authorizing the Attorney General to promulgate regulations necessary for the legalization program. *See* S. 1200, 99th Cong., 1st Sess. § 202(f)(1), (g)(1) (1985).

The Conference rejected this broad provision in favor of the more limited House bill, which differed from the Senate version in three principal respects: 1) it did not include the broad reference to "decision or" determination; 2) it did not include an express ban on class actions; and 3) it did not refer to "this section" and or to the provision in that section of the Senate bill for Attorney General rulemaking. Indeed, in the final version of IRCA, the Attorney General's legalization program rulemaking authority (8 U.S.C. § 1255a(g)) is not even mentioned until *after* the specialized review provisions (8 U.S.C. § 1160(e), § 1255a(f)), thus further indicating that this rulemaking was *not* subject to those specialized review provisions.

> convincing facts contained *in the record* considered as a whole. [Emphasis supplied].

This provision bespeaks an understanding that this judicial review procedure would apply only to claims that have been subjected to administrative consideration and that would therefore result in the creation of an "administrative record." But the single-level of administrative review established by IRCA cannot resolve constitutional and statutory challenges to the validity of the INS' legalization policies. Rather, the LAU is bound by the INS' policy decisions, and IRCA provides no right of review from an LAU determination to the INS itself.[7]

Moreover, the "abuse of discretion" standard of judicial review under 8 U.S.C. § 1160(e)(3)(B) makes no sense for constitutional or statutory challenges. While that standard is a rational one for judicial review of an administrative adjudication of the *facts* of an individual legalization application, it is plainly unsound to place such stringent limits on the judiciary in deciding constitutional or statutory challenges to the INS' underlying

[7] *See Ayuda, Inc. v. Thornburgh, supra*, 880 F.2d at 1332 n.7 ("Facial challenges to the regulation [in a proceeding before the LAU] are not permitted"); *Matter of Fede*, Interim Dec. 3106 at 2-3 (BIA 1989) and cases cited ("A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer."); Pet. App. 13a.

There does not appear to be a single case in which the LAU has reversed a legalization denial on the basis of a constitutional due process argument or a claim that the INS' policies or regulations are contrary to law. Nor would there be any such Board of Immigration Appeals ("BIA") decision, even from review of a denied legalization applicant's deportation order, since IRCA provides that the LAU's decisions with respect to legalization applications may not be reopened or reviewed. *See* 8 C.F.R. § 103.3(a)(2)(iii) ("No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings.").

legal standards. *Compare* 5 U.S.C. § 706(2)(A); *cf.* 2 S. Childress & M. Davis, *Standards of Review* § 17.2 at 335-36 (1986).

3. Congress' incorporation into IRCA's specialized review provisions of § 106 of the INA, 8 U.S.C. § 1105a—which governs direct appellate review of final deportation orders—is further evidence that Congress intended to preserve district court review over challenges to INS regulations and policies under the legalization program. IRCA provides, with respect to administrative denials of legalization applications, that "[t]here shall be judicial review of such a denial only in the judicial review of an order of deportation [and in the context of SAWs, exclusion] under Section [106 of the INA, 8 U.S.C. §]1105a." 8 U.S.C. § 1255a(f)(4)(A), § 1160(e)(3)(A).[8] And § 106 has *consistently been interpreted to permit* district court review of legal challenges to INS policies, even when those policies could ultimately give rise to a deportation order.[9] To be sure, petitioners now

[8] This section provides, *inter alia*, that jurisdiction to review "final orders of deportation" is vested exclusively in the courts of appeals, and that petitions for such review must be filed within six months of the date of the final deportation order.

[9] *See, e.g., Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 472 U.S. 846 (1985); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 364 (C.D. Cal. 1982); *National Center for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vac. on other grounds*, 481 U.S. 1009 (1987), *reaff'd on remand*, —— F.2d —— (9th Cir. 1990); *Hotel & Restaurant Employees Union v. Smith* 563 F. Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F. Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *see also Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 (1968) ("In situations to which the provisions of § 106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court."). This Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), is not to the contrary. *Chadha*

contend that these § 106 cases were wrongly decided. Pet. Br. at 28. But even assuming that is true (which we deny), petitioners' answer is unresponsive. For the question here is the *1986 Congress' intent*, and the key to that intent is that Congress must be presumed to have legislated on the basis of the longstanding, consistent judicial construction absent any persuasive indication to the contrary. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985), *quoting Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Petitioners argue too that whatever the proper scope of the term "final order" under § 106, IRCA provides that "a determination respecting an application" is to be considered a "final order" within the meaning of § 106. But we do not contend that an IRCA regulation or policy that constitutes "a determination respecting an application" is reviewable in district court. Rather, we argue that Congress' decision to adopt the machinery of § 106 (along with the uniform body of case law interpreting that provision) informs the meaning of "a determination respecting an application." In light of that case law, the adoption of § 106 demonstrates that Congress did *not* intend the INS' legalization regulations and policies to be encompassed within the scope of IRCA's specialized review provision. Those policies and regulations exist separate and apart from any specific individual adjudication, and therefore can be reviewed

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simply stands for the proposition that an individual alien subject to an outstanding deportation order *may* challenge in the courts of appeals any determination on which the order is contingent. *Chadha* does not preclude district court review of such determinations *prior* to the initiation of deportation proceedings, and indeed, does not even address the issue. See *Ayuda, Inc. v. Thornburgh*, *supra*, 880 F.2d at 1335, 1337; *id.* at 1358 (Wald, C.J., dissenting); *Cheng Fan Kwok v. INS*, *supra*, 392 U.S. at 216.

where there has been *no* "determination respecting an application" in an individual case.[10]

In short, where plaintiffs challenge an INS regulation or policy implementing the legalization provisions of IRCA rather than "a determination respecting an application for adjustment of status," by their terms the specialized review procedures of IRCA do *not* apply.[11]

II. THE LEGISLATIVE GOALS UNDERLYING IRCA'S SPECIALIZED REVIEW PROVISION ARE ENHANCED, RATHER THAN UNDERMINED, BY PERMITTING DISTRICT COURT REVIEW OF LEGAL CHALLENGES TO THE INS' REGULATIONS AND POLICIES.

The point of 8 U.S.C. § 1160(e)(1) is to channel legalization claims into a specialized administrative procedure that will resolve those claims efficiently and accurately while protecting the federal courts from being overrun with claims brought by disappointed legalization applicants seeking to delay their deportation by relitigating the denial of their legalization applications. *See, e.g.*, S. Rep. No. 132, *supra*, at 48 (Senate Judiciary Com-

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[10] Petitioners contend that until an actual individual claim is adjudicated, plaintiffs' challenge to an INS legalization regulation or policy would be "abstract" and unrelated to any "agency action." Pet. Br. at 19-20, *citing Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990). But *Lujan* did not reject the longstanding principles governing pre-enforcement review of agency actio.; it merely applied them to the unique facts of that case. *See* 110 S.Ct. at 3190; *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967) (pre-enforcement review permissible absent "persuasive reason to believe" that Congress meant to preclude it).

[11] That is not to say that an individual alien who eventually benefits from a district court challenge to INS legalization policies would be wholly exempted from those administrative procedures. To the contrary, in this case as in the others cited *supra* at p. 3 n.1, those individuals would merely be placed back into the administrative system, with their individual cases considered under the proper agency procedures. *Compare Bowen v. City of New York*, 476 U.S. 467, 485 (1986); *United Auto Workers v. Brock*, 477 U.S. 274, 287-88 (1986).

mittee Report on Simpson immigration bill, which noted the committee's concern "that efforts will be made, on behalf of many persons who are ineligible for the legalization program, to delay the final determinations of their applications. This would prevent not only their own deportation but the expeditious operation of the program for others").[12] While Congress recognized that some legalization claims would undoubtedly reach the courts on review of orders of deportation (and exclusion, in the case of SAWs), the specialized review procedure was designed to winnow out many such claims, and to ensure, when and if judicial review was sought, that a detailed administrative record would have been created, both to facilitate appellate review and to justify the deferential standard of review that Congress had provided.

All of this is sound policy as applied to individual, fact-specific challenges to legalization denials. Most such claims can be resolved administratively at the LAU level by experienced administrative decisionmakers who can quickly evaluate whether the LO or RPF correctly applied the INS' legalization guidelines to the facts of each individual case. The burden on the courts will thereby be substantially decreased, both because those claims will be channeled into the administrative procedure in the first instance, and because, given the deferential standard of review, the time required (and in many instances, the necessity) for appellate review will be greatly diminished.

However, it is apparent that these same goals are *not* furthered—and there is *no* indication that Congress thought otherwise—by requiring constitutional and statutory challenges to be funnelled into that specialized review procedure as well. This is true for four reasons.

First, the administrative appeal procedure cannot "winnow" out claims that the LAU lacks power to re-

[12] Similar concerns underlie other statutory limitation-of-judicial-review provisions. *See, e.g., Foti v. INS*, 375 U.S. 217, 224 (1963); *Johnson v. Robison*, 415 U.S. 361, 370 (1974).

solve; those claims could eventually reach the courts of appeals regardless of any preliminary administrative consideration.

Second, such a requirement would increase the number of cases in the judicial system generally, because the district courts would be unable to resolve broad-based legal challenges to the INS' regulations and policies by issuing class-wide or injunctive relief where appropriate.

Third, the administrative process would itself face a far greater docket of legalization appeals; not only because the hundreds of thousands of aliens affected by the challenged INS policies could file claims challenging their wrongful denials, but also because a court order requiring reconsideration could not come until the end of the administrative process (rather than at the beginning, as occurred in many cases where prompt injunctive relief was obtained from the district courts), thus requiring reconsideration of all these same cases.

Finally, the effectiveness of court of appeals review would be diminished, because preliminary consideration of the legal challenge would be conducted by an administrative body that lacks authority to consider the challenge and the capacity to make a proper record, rather than by a district court that can review the challenge, engage in necessary fact-findings, and narrow the issues for appellate review.[13]

[13] Petitioners suggest that permitting district court review of such challenges creates an "anomaly" because the courts of appeals would hear only the less important cases involving the application of the statute in individual cases, while the district courts would review the more significant cases involving broad questions affecting a whole class of aliens. Pet. Br. at 14. This is a wholly specious comparison. These broad legal challenges, like any other civil claim, would initially be brought in district court. The more narrow, fact-specific claims would initially be brought to the LAU. However, both types of challenges would receive court of appeals' attention. The only difference is that the more important cases involving challenges to regulations and policies would receive initial consideration from a *federal court* that has extensive expertise and appropriate procedures for resolving such

1. It is estimated that more than 200,000 aliens have legalization claims affected by the INS policies at issue in the cases cited *supra* at p. 3 n.1.[14] While many of those claims have not yet been administratively adjudicated (since appellate review of certain district court injunctions has been stayed pending this Court's decision),[15] in a great many instances the courts were able to resolve plaintiffs' claims by enjoining the INS' challenged legalization policies *prior* to the expiration of the statutory application period, thus allowing affected aliens to apply for legalization and be granted relief under the proper constitutional and statutory standards. Under petitioners' construction, however, virtually none of those aliens' claims could yet have been resolved, since the vast majority of such claims would have been denied at the LO level, thrown into a futile administrative process, and then many years later would begin to appear on the docket sheets of the federal courts of appeals in separate, individual deportation cases.[16] Eventually thousands of

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issues, and the less important challenges would receive initial consideration from the administrative body expert in such matters.

[14] *See INS Loses Again on "Known to the Government,"* 65 Interp. Releases 334, 335 (1988); *Amnesty Lawsuit Seeks Change in Public Charge Definition,* 65 Interp. Releases 376 (1988); *Three Courts Extend Legalization Deadlines, Distinguish Pangilinan,* 65 Interp. Releases 818 (1988); *Government Seeks 90-Day Cap on Late Filings in CSS and LULAC Amnesty Cases,* 67 Interp. Releases 923, 924 (1990); Pet. Br. at 30, 31 n.24.

[15] This is true, for example, of more than 75,000 claims in *Ayuda, Inc. v. Thornburgh, Catholic Social Services v. Thornburgh, LULAC v. INS* and *Zambrano v. INS,* all cited *supra* at p. 3 n.1. *See* Pet. Br. at 31 n.24; 65 Interp. Releases, *supra,* at 819.

[16] *See Ayuda, Inc. v. Thornburgh, supra,* 880 F.2d at 1330 ("If denials of legalization are appealed to the courts of appeals only after subsequent deportation orders, it would take a good deal more time to gain a judicial judgment on the legality of the INS's interpretation . . . ."); *id.* at 1356 (Wald, C.J. dissenting) ("judicial review of the first wave of applications would almost certainly not take place until long after the 12-month [application] period had lapsed."). As of mid-September 1980 we are aware of only three published court of appeals decisions concerning legalization denials.

such cases would clog the courts of appeals—including the more than 20,000 cases affected by the Eleventh Circuit's ruling below—all presenting identical legal challenges that could have been disposed of in a single, timely-resolved district court proceeding.

2. Petitioners' construction would also burden the courts of appeals by providing an inadequate underlying record. Forcing constitutional and statutory challenges into IRCA's special review procedures, and thus precluding first-tier district court review, would result in the courts of appeals having to proceed without an adequately developed evidentiary record and without the benefit of another decisionmaker's evaluation of the challenge.[17] This case, for example, raises due process issues requiring extensive factual analysis under *Mathews v. Eldridge,* 424 U.S. 319 (1976). See Pet. App. 13a-17a. The LAU could not consider those issues and therefore would not be in a position to oversee discovery or develop a record as to the underlying due process facts (particularly to the extent the facts concern systemic issues). Ac-

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In part, the delay in obtaining judicial review is due to the fact that while IRCA was enacted on Nov. 6, 1986, no SAW applicant would file for legalization until June 1, 1987. Even then, the alien could not obtain judicial review until the application was denied, the administrative appeal was exhausted and deportation proceedings were initiated and concluded. Meanwhile, because of the relatively short window period for filing legalization applications, the great majority, if not all, of the legalization applications under IRCA would already have been decided at the LO level, long before any court of appeals ruling. *Compare Heckler v. Ringer,* 466 U.S. 602, 619, 627 (1984) (benefit claims under the Medicare Act are filed on an ongoing basis, and judicial review could be obtained before most such claims have been filed).

[17] While the LAU is required to provide a written statement explaining its reasons for denying a legalization application (8 C.F.R. § 103.3(a)(2)(i), it could either cite the unlawful policy or regulation or summarily dismiss on the ground that, in light of the settled INS policy and the LAU's limited authority, the claim was "patently frivolous." *See* 8 C.F.R. § 103.3(a)(2)(iv).

cordingly, absent preliminary district court consideration, the courts of appeals would be forced either to make the record themselves or to decide the underlying issues purely on a paper record—a result that Congress can be presumed not to have intended.

3. Petitioners' approach would also impose a substantial and wholly unnecessary burden on the administrative process. Given the long delays inherent in the specialized review process, by the time the various courts of appeals could rule on the merits of individual claimants' challenges to the underlying INS policies, hundreds of thousands of aliens would have been processed under those identical policies. Assuming that the appropriate appropriate legal standard, if petitioners' position were remedy would be a new administrative hearing under the accepted the result would be that the LAU would have to review each of the hundreds of thousands of applications twice: first when the alien was denied legalization as a result of the INS' unlawful policy and then again on remand from the courts of appeals.

4. Permitting district court review of challenges would not impose a countervailing burden on those courts. Despite the approximately 3.1 million claims for legalization filed since the enactment of IRCA,[18] less than 30 district court lawsuits have been filed challenging the INS' legalization policies. See Pet. for Cert. at 28. While some of those cases have been time-consuming, the overall demand on judicial resources does not come close to the enormous burden on the courts of appeals that would result under petitioners' approach, which would send virtually all of the underlying claims in those cases separately to the courts of appeals.[19]

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[18] *See* INS Provisional Legalization Statistics (Jan. 9, 1990).

[19] *Compare Bowen v. Michigan Academy of Family Physicians, supra,* where the Court addressed the inundation argument by stating:

> We do not believe that our decision will open the flood gates to millions of Part B Medicare claims. Unlike the *determinations* of amounts of benefits, the *method* by which such amounts are determined ordinarily affects vast sums of money and thus differs qualitatively from the "quite minor matters" review of which Congress confined to hearings by carriers. In addition, as one commentator pointed out, "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case." Note, 97 Harv. L. Rev. 778, 792 (1984) (footnote omitted). [476 U.S. at 676, 680 n.11.]

Petitioners contend that *Bowen* is inapposite because the issue there was whether Congress had completely precluded federal court jurisdiction. Pet. Br. at 22. But even if that were a distinguishing factor, which we dispute for the reasons set forth *infra*, at 22-24, it would not affect the validity of this Court's common sense observation about the flow of litigation entering the federal courts. *Accord, Johnson v. Robison, supra,* 415 U.S. at 373 (similar statutory policies under the Veterans Act are not furthered by construing the preclusion-of-judicial review language to apply to constitutional challenges); *Traynor v. Turnage,* 485 U.S. 535, 544 (1988).

[20] *See* S. Rep. No. 132, *supra,* at 48.

[21] Petitioners point to a few instances in which district courts, having found an INS legalization policy to be unlawful, have or-

5. Finally, permitting district court review of broad IRCA legal challenges would *not* result in the delays that prompted Congress to restrict judicial review over individual legalization application denials. Congress' concerns with delay in IRCA had nothing to do with the prospect of class action suits challenging INS regulations, but rather with the prospect of disappointed individual applicants relitigating the factual basis of their unsuccessful applications, both before and after a deportation order has been issued.[20] Under petitioners' approach, the overall delays would be considerably longer, since the courts of appeals would be clogged with individual legalization cases that could have been resolved through a handful of district court actions for injunctive, class-action relief. Any concern Congress may have had about flooding the district courts with individual cases raising factual challenges simply has no bearing on the type of issue raised by the present category of claims.[21]

III. PETITIONERS' APPROACH IS INCONSISTENT WITH CONGRESS' GENERAL GOAL OF ENCOURAGING EACH ELIGIBLE ALIEN TO APPLY FOR LEGALIZATION BY PROVIDING PROMPT, ACCURATE INFORMATION, AN ASSURANCE OF CONFIDENTIALITY, AND THE RIGHT TO EMPLOYMENT AUTHORIZATION PENDING A DETERMINATION ON THEIR APPLICATION.

Petitioners' construction of 8 U.S.C. § 1160(a) is also inconsistent with the broader congressional statutory goal of maximizing participation in the legalization program. In enacting IRCA, Congress "intend[ed] that the legalization program should be implemented in a liberal and generous fashion . . . to ensure true resolution of the problem. . . ." H.R. Rep. No. 682, *supra*, at 72 (1986). A "generous program" of legalization was deemed "essential" if the United States was to make progress on immigration reform. *Ibid.*

Congress recognized that many aliens would be hesitant to come forward and take advantage of the legalization program because of their natural suspicion of the INS and their acute fear of deportation. Accordingly, to maximize participation in the program, Congress took special pains to assure: 1) that prompt and accurate information about the program and its eligibility criteria would be widely disseminated by the QDEs and the Attorney General;[22] 2) that all applications would be submitted and considered in confidence, and that the information in those applications would never be used

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dered the legalization filing period to remain open until affected individuals have had a chance to submit applications. Pet. Br. 31 n.24. But those courts acted appropriately given the facts before them. *See generally In re Thornburgh*, 869 F.2d 1503 (D.C. Cir. 1989), and its discussion of *INS v. Pangilinan*, 486 U.S. 875 (1988). In any event, delays resulting from unconstitutional or otherwise unlawful agency action were not the type of delays with which Congress was concerned in enacting 8 U.S.C. § 1160(e) and § 1255a(f).

[22] *See* 8 U.S.C. § 1255a(c)(2)(A)(i); H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. at 92-93 (1986).

against the alien in a deportation proceeding;[23] and 3) that all aliens who came forward and could demonstrate *prima facie* eligibility for legalization would be granted statutory "employment authorization" pending a final determination on their claims, an essential right in light of the new employer sanctions provisions of the Act.[24] All three of these statutory protections would be directly undermined by petitioners' approach.

Congress in enacting IRCA was aware that many unlawful aliens to whom legalization was being offered were fearful of the government, particularly the INS, and concerned that once they came "out of the shadows" and made known their presence in this country, they would risk deportation.[25] To overcome this fear—which was seen as the greatest impediment to successful implementation of the legalization program—Congress created special "buffer" agencies, the Qualified Designated Entities, most of which were church groups, labor unions, and other community organizations. The QDEs' statutory role was to act as an intermediary between the INS and the immigrant community, to provide the alien community with accurate information about the legalization program and to help potentially eligible aliens proceed through the legalization process.[26]

Toward this end, Congress also enacted strict confidentiality protections in IRCA. As the House Judiciary Committee Report explained:

> The Committee hopes that by working through the voluntary agencies, the Attorney General might be

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[23] *See* 8 U.S.C. § 1255a(c)(5).

[24] *See* 8 U.S.C. § 1160(d)(1)(B), (2)(B), § 1255a(e)(1)(B), (2)(B).

[25] *See, e.g.*, H.R. Rep. No. 682, *supra*, at 73 ("The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is distrust of authority and lack of understanding among the undocumented population.").

[26] *See, e.g.*, H.R. Rep. No. 682, *supra*, at 73; H.R. Conf. Rep. No. 1000, *supra*, at 92-93.

able to encourage participation among undocumented aliens who fear coming forward. To assist in this endeavor, the bill authorizes the Attorney General to fund outreach services and provides for an extensive education and outreach program prior to the application period.

The files and records kept by the [QDE] organizations are confidential, and not accessible to the Attorney General or any other governmental entity. The applicant must consent to the application being forwarded for official processing. The confidentiality of the records is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS. [H.R. Rep. No. 682, *supra*, at 73].[27]

Not only would petitioners' approach force applicants to decide whether to file their legalization applications long before they could have any hope of obtaining a judicial determination of the validity of the INS' legalization regulations, but more importantly, petitioners' approach would largely eliminate the benefits of the confidentiality provision. If judicial review of the INS' policies could only be obtained on review of an order of deportation, each alien seeking to challenge an INS policy would individually be required to waive confidentiality by voluntarily submitting to a deportation proceeding as a precondition to obtaining judicial review.[28]

[27] IRCA provides that the "files and records of qualified designated entities with respect to filing an application . . . are confidential" and unavailable to the Attorney General or INS "without the consent of the alien." 8 U.S.C. § 1255a(c)(4). IRCA also provides that "[n]either the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof" may use any information contained in a legalization application "for any purpose other than to make a determination on the application," and the statute imposes criminal penalties on anyone who unlawfully "uses, publishes, or permits [such] information to be examined." 8 U.S.C. § 1255a(c)(5). *See also* S. Rep. No. 132, *supra*, at 47 (confidentiality provisions seek "to assure applicants that they may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization.").

Under our construction of IRCA, by contrast (and with the exception of the D.C. Circuit in *Ayuda*, the construction of every lower court as well), a legal challenge to the validity of the INS' eligibility guidelines could be litigated without threatening the aliens' statutory right of confidentiality, since such a challenge could proceed on a class-wide basis (or be brought by an institutional plaintiff), without any individual having to disclose any confidential information in a deportation proceeding as a precondition to challenging the INS' policies.[29]

Finally, petitioners' approach would cause irreparable harm to persons entitled to legalization but for an unlawful INS legalization policy, by denying vast numbers of aliens affected by that policy the statutorily-protected right to work lawfully in this country, and thereby support themselves and their families, pending review of their legal challenge by a court of appeals. Under IRCA, employment authorization—*i.e.*, the right to work lawfully—is available to any applicant or potential applicant who can establish a *prima facie* or non-frivolous claim of eligibility for legalization. 8 U.S.C.

[28] Because an Order to Show Cause cannot issue unless the INS can state a precise ground for deportation (8 C.F.R. § 242.1(b)), an alien seeking to obtain judicial review of a legal challenge would be required to provide the same information concerning unlawful status that was contained in his or her confidential application.

[29] The advantages of class relief and injunctive relief in cases challenging policies and regulations is well-established, and Congress should not be assumed to have eliminated that protection absent evidence to the contrary. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 699-701 (1979) (presuming Congress intended class actions to be available absent statutory language to the contrary, and noting many reasons why the class action device may be appropriate in benefits litigation). As noted *supra* at 7 n.6, Congress in the final version of IRCA *eliminated* language in the Senate bill that would expressly have prohibited class action challenges to legalization policies.

§ 1160(d)(1)(B), (2)(B), § 1255a(e)(1)(B), (2)(B). Given the lengthy delays that petitioners would build into the system before a legal challenge to the INS' immigration policies could be adjudicated, large numbers of aliens who are ineligible for legalization solely as a result of an unlawful INS poicy would be precuded from working and thereby contributing to the support of their families, until their cases were finally resolved upon review of an order of deportation—a procedure that could take years to complete. This collateral, but very critical, consequence of petitioners' position cuts deeply against that position.[30]

IV. PETITIONERS HAVE BEEN UNABLE TO PROVIDE ANY CLEAR AND CONVINCING EVIDENCE OF CONGRESS' INTENT TO CURTAIL OR PRECLUDE FEDERAL QUESTION REVIEW OF LEGAL CHALLENGES TO THE INS' REGULATIONS AND POLICIES.

The foregoing is more than sufficient to demonstrate that Congress did *not* intend 8 U.S.C. § 1160(e) to strip the district courts of their traditional jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 over constitutional and statutory challenges to the INS' policy-making decisions. That conclusion is strengthened when this case is evaluated under the standard of *Rusk v. Cort*, 369 U.S. 367 (1962), *Abbott Laboratories v. Gardner*, *supra*, 387 U.S. 136, *Bowen v. Michigan Academy of Family Physi-*

[30] *Cf. Mathews v. Eldridge*, *supra*, 424 U.S. at 331 n.11 (applying the "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered"); *Oestereich v. Selective Service System*, 393 U.S. 233, 243 (Harlan, J., concurring) (Selective Service Act could not bar pre-induction review of facial challenges to statute or regulations because "[t]o withhold pre-induction review in this case would thus deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation . . . would raise serious constitutional problems . . . .").

cians, *supra*, 476 U.S. 667, and *Traynor v. Turnage*, *supra*, 485 U.S. 535. The principle established there is that Congress will *not* be found to have precluded judicial review or to have imposed substantial obstacles to judicial review absent "clear and convincing evidence" of such an intent in the legislative scheme. Petitioners argue that this heightened standard applies only where judicial review is altogether foreclosed. Pet. Br. at 22. But petitioners' attempt to limit the clear-and-convincing-evidence-of-congressional-intent standard in this way is unsound. In any event, petitioners' construction of IRCA's review provision *does* deny judicial review to many categories of claims and claimants under the legalization program.

1. *Rusk v. Cort* is, we believe, dispositive. There, the Court held that "clear and convincing evidence" of an intent to foreclose federal question jurisdiction is required where the alternative federal forum is theoretically available, but highly impractical. In *Rusk*, a United States citizen living abroad had his citizenship revoked in an administrative proceeding. The government claimed that judicial review was available only pursuant to a limited review procedure which provided that former citizens could challenge such revocations by writ of habeas corpus filed from within this country. The Court disagreed that Congress intended to limit review to that special procedure, because "absent clear and convincing evidence that Congress so intended," it should not be presumed that Congress "intended that a native of this country living abroad must travel thousands of miles, be arrested and go to jail in order to attack an administrative finding that he is not a citizen of the United States." 369 U.S. at 375, 380.[31]

[31] *See also Califano v. Yamasaki*, *supra*, 442 U.S. at 693 ("this Court has been willing to assume a congressional solicitude for fair procedures, absent explicit statutory language to the contrary."). While petitioners are correct that *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), did not discuss this heightened standard (Pet. Br. at 22), that is because the court

Similarly, absent clear and convincing evidence of such an intent in this case, this Court should not presume that Congress intended to require individual legalization claimants, before they could pursue a constitutional or statutory challenge to an INS policy or regulation that precluded (or greatly minimized their prospects of) legalization: 1) to make a futile and costly application for legalization[32]; 2) to appeal the resulting denial to an LAU that lacks authority to consider the merits of their constitutional or statutory claim; 3) to be apprehended by the INS for initiation of deportation proceedings (which the INS in its discretion could choose *not* to initiate—thus precluding judicial review altogether),[33] or to waive confidentiality by voluntarily surrendering to and risking arrest and incarceration by the INS[34]; 4) to be issued an order of deportation and then to file an unsuccessful appeal to the Board of Immigration Appeals[35]; 5) to file for review in the court of appeals; and 6) throughout this entire lengthy period, to be deprived of "employment authorization" under 8 U.S.C. § 1160(d)(2)(B) or 8 U.S.C. § 1255a(e)(2)(B) and therefore have no legal right to work in this country pending the court's final determination. To the contrary, the enormous difficulty and impracticality of that procedure as a mechanism for bringing such a legal challenge provides persuasive evidence that such a procedure was *not* intended by Congress as the exclusive procedure.[36]

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of appeals forum under the Hobbs Act is more practical for APA review of agency fact-finding. *See* 470 U.S. at 744-45.

[32] The cost of filing legalization applications ranged from $185 for an individual to $420 per family. 8 C.F.R. § 103.7(b).

[33] *See, e.g., Matter of Merced*, 14 I&N Dec. 644 (BIA 1974), *aff'd mem.*, 514 F.2d 1070 (5th Cir. 1975); *Lopez-Tellez v. INS*, 564 F.2d 1302 (9th Cir. 1977).

[34] *See* 8 U.S.C. § 1252.

[35] *See* 8 C.F.R. § 3.1(b).

[36] We do not by this argument mean to suggest (nor did the Court in *Rusk*) that federal question jurisdiction (or jurisdiction under 8 U.S.C. § 1329) would be the only way for a claimant to raise such a claim. We see no reason why in appropriate cases after an order of deportation has issued, an individual could not challenge an agency action upon which the order of deportation was contingent under 8 U.S.C. § 1105a. *See INS v. Chadha, supra*, 462 U.S. at 937-39. Although the majority in *Ayuda* suggested that this could result in the courts of appeals receiving two identical challenges to a regulation, one from a district court and the other from the LAU (and in the latter case the appellate court would have to apply the statutory "abuse of discretion" standard under 8 U.S.C. § 1160(e)(3)(B) or § 1255a(f)(4)(B)), that is not true. Because IRCA's review provision does not apply to such challenges in either instance, consequently neither does its standard of review.

2. Viewing respondents' claim in this case categorically—*viz.*, in the context of the many constitutional and statutory challenges to the INS' legalization regulations and policies that have been (or could be) brought—it becomes readily apparent that if "a determination respecting an application" includes agency policymaking decisions respecting the IRCA legalization program, judicial review for many claimants *would* as a practical matter be denied completely. Thus, just as one consequence of petitioners' construction would be to burden the LAU and court of appeals' dockets with claims of individual aliens who were denied legalization on the basis of unlawful agency policies,[37] another consequence would be to deny relief to many thousands of claimants altogether, because they would be completely shut out from the administrative or judicial review procedures. For this reason as well, the presumption of judicial review and the necessity for clear and convincing evidence to overcome the presumption should be required in this case—particularly given the constitutional nature of respondents' claims. *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988).

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[37] As noted *supra*, at pp. 3-4 n.1, the INS has effectively conceded the invalidity of many of its IRCA eligibility regulations, either by not appealing the merits of injunctions against it or by entering into settlement agreements providing plaintiffs with the relief they had sought from the court.

1. Claims By Institutional Plaintiffs, Including ODEs.

Petitioners acknowledge that under their approach, institutional entities involved in the legalization process (like plaintiffs Migration and Refugee Services and Haitian Refugee Center) could *never* obtain judicial review of allegedly unconstitutional or unlawful INS legalization policies, because there could never be "a determination respecting an application" for such institutions. Pet. Br. at 23. That does not mean that Congress intended to preclude judicial review under 28 U.S.C. § 1331 or 8 U.S.C. § 1329 for organizations suffering institutional injury as a result of unlawful INS policies. To the contrary, the point petitioners accept indicates that Congress must have intended to permit institutional plaintiffs *and* individual plaintiffs to bring this narrow category of federal claim.

As petitioners recognize, whether Congress intended institutional plaintiffs to have a statutory cause of action under the legalization program depends upon the legislative purposes and on whether Congress anticipated that those institutions would have any role in the statutory scheme. Pet. Br. at 24-25; see *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). Petitioners rest their argument on the absence of any direct legislative evidence that Congress created an *express litigation* role for the QDEs and other institutional plaintiffs. Pet. Br. at 24. But that stands the presumption of judicial reviewability on its head; its premise is that *no* judicial review will be available for such plaintiffs absent express legislative statements conferring such right of review.[38] Moreover, petitioners ignore that the function that the institutional plaintiffs seek to serve in this litigation is precisely the function that Congress in IRCA created the QDEs to serve.

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[38] *Compare, e.g., Bowen v. Michigan Academy, supra*, 476 U.S. at 667, *aff'g*, 757 F.2d 91, 93-94 (6th Cir. 1985), where institutional standing was permitted despite the absence of any direct statutory reference to the Academy's right to pursue its separate institutional interests.

Congress required the Attorney General to designate various organizations as QDEs in order to overcome the alien community's natural fear of the INS and to encourage maximum participation in the legalization process.[39] Congress thus believed it necessary to create institutional buffer groups, with quasi-governmental status but strong ties to the alien community, to provide prompt accurate information to aliens, to treat their inquiries and applications in confidence, and to advise them and assist them *before* those aliens are called upon to decide whether to file formal applications for legalization.

Petitioners do not dispute that QDEs have institutional interests in addition to any interests that their alien applicant clients may have. See Pet. Br. at 23-27; Pet. App. 41, 41a, 43a.[40] Petitioners also do not dispute that Congress intended the QDEs to play a crucial statutory role. Pet. Br. at 6 n.5. The issue is simply whether there is "clear and convincing evidence" in the legislative record to overcome the presumption of judicial review for these organizations; *viz.*, that Congress intended QDEs to be denied all access to the courts even when their statutory functions were being directly undermined by the INS' allegedly unconstitutional or unlawful statutory policies.

Given the extensive and essential role of QDEs in the legalization process, the fact that Congress did not explicitly provide them with a role as "litigating ombudsmen" (Pet. Br. at 24) is of no relevance. Viewing the

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[39] *See* 8 U.S.C. § 1255a(c)(2); *see also supra* at 18-20. Petitioners concede as much. *See* Pet. Br. at 6 n.5.

[40] This includes their interests in providing timely, accurate information concerning the statutory legalization criteria (not only to serve the general legislative purposes, but also to promptly resolve any conflicts between their roles as agents of the INS and as representatives of their alien clientele), and in encouraging the widest number of potentially successful applicants to seek legalization (both for the aliens' sake, and because the QDEs are entitled to federal compensation for each successful application they process). *See, e.g., Ayuda, Inc. v. Thornburgh, supra*, 687 F. Supp. at 655-57.

statutory scheme and legislative purposes as a whole, it can most fairly be said that Congress intended them to have access to the courts to protect their own and their clients' interests. There is no clear and convincing evidence to the contrary.

2. Claims By Aliens Who Were Prevented By the INS or a QDE From Filing a Timely Legalization Application.

Although the issue does not arise in this case, many claimants challenging the INS' legalization regulations in district court have alleged that they were prevented from filing formal applications for legalization, by an LO or QDE acting as the INS' agent, on the ground that the challenged INS regulation made them ineligible and that application would be pointless.[41] Under petitioners' approach, these individuals would be unable to obtain *any* review of the underlying INS policy, because they were never allowed to file "an application." Again, petitioners point to no evidence that Congress intended to preclude judicial review for such persons. Nor is such an intent likely, since if class-wide injunctive relief in district court were available *prior* to the expiration of the

[41] *See, e.g., Vargas v. Meese, supra,* 682 F. Supp. at 591-93; *In Re Thornburgh, supra,* 869 F.2d at 1506, 1513-16. The records in those cases (and *Immigrant Assistance Project, LULAC* and *Catholic Social Services*) document numerous instances in which the INS offices, or the QDEs acting as the INS' statutory agents, mindful of the substantial expense (up to $420 per family) and obvious futility of filing an application that would automatically be denied under the existing INS eligibility guidelines, told potential applicants not to file an application, or discouraged them from doing so by informing them that such an application would not be accepted. *See also* INS Legalization Manual at IV-6 ("if the applicant is statutorily ineligible, the application will be rejected"); *id.* at IV-3, IV-6, IV-7 (showing that an application is "rejected" if it is turned down without processing and without acceptance of the filing fee); *cf.* S. Rep. 132, *supra,* at 47 (applicants who approach the QDEs "may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization.").

application deadline, the INS could be required to accept those aliens' applications and to process them administratively under the correct statutory criteria—a result that is fully consistent with Congress' goal of encouraging applications from all potentially eligible legalization claimants.

Petitioners' approach would also preclude judicial review of claims by legalization applicants who were denied statutory employment authorization during the six to seven month period *prior to the start of the application period* on the ground that, under an allegedly unlawful INS legalization policy, they could not establish a *prima facie* or nonfrivolous claim for legalization. See 8 U.S.C. § 1160(d)(1)(B), § 1255a(e)(1)(B) (providing employment authorization to "an alien who is apprehended before the beginning of the application period . . . and who can establish a nonfrivolous case of eligibility to have his status adjusted . . . (but for the fact that he may not apply for such adjustment until the beginning of such period) . . ."). Under petitioners' construction, the wholesale denial of employment authorization to such aliens during the pre-application period could *never* be remedied, despite the obvious irreparable injury, because no legalization application had yet been denied.[42]

[42] If petitioners were to agree that the district courts *could* assert jurisdiction over pre-application claims for employment authorization (as did the court in *Catholic Social Services v. Meese, supra,* 664 F. Supp. at 1380-81, which involved a challenge to an INS regulation that resulted in the exclusion of potential SAW applicants prior to the start of the application period), that would be all the more reason to conclude that Congress intended to permit district court review over *post*-application period constitutional and statutory challenges to the INS' legalization policies as well. *See Ayuda, Inc. v. Thornburgh, supra,* 880 F.2d at 1337-38 n.13 (noting that since a denial of asylum "might be reviewable before deportation proceedings, the argument that denials during the proceedings are not separately reviewable rests on less powerful—if not insignificant—grounds."), *citing Foti v. INS, supra,* 375 U.S. at 229, and *UAW v. Brock, supra,* 477 U.S. at 294 (White, J., dissenting).

The dilemma faced by these individuals points up a substantial flaw in petitioners' analysis, which would allow the INS to violate the statutory and constitutional rights of persons whom Congress intended to benefit from legalization as long as the INS did so in a manner that prevented them from formally applying for legalization. For example, where the INS refused to accept applications from aliens who did not satisfy the agency's unlawful eligibility regulations (or where the INS barred applications from persons born in a certain country, or who spoke a particular language, or had worked on a particular farm or crop), under petitioners' construction that blatantly unlawful policy would be immune from judicial challenge, despite those individuals having satisfied the statutory eligibility criteria as properly construed. Surely Congress did not intend to clothe the INS with authority to engage in such unlawful policymaking, any more than it intended to deny access to the courts for aliens who, because they were ineligible under the INS' unlawful legalization guidelines, were prevented by the INS or a QDE from filing a formal legalization application.

3. Petitioners do not point to any persuasive evidence of congressional intent to support their construction of the IRCA review provisions. Rather, petitioners' argument is essentially a series of reasons why Congress lawfully *could* have included such claims within the scope of 8 U.S.C. § 1160(e). But absent evidence that Congress *did* have such an intent, whether Congress had the power to enact such a provision is irrelevant. Much more is required to overcome the compelling evidence—based on the statutory language and consistent legislative policies—that Congress did *not* intend in IRCA to eliminate the district courts' traditional jurisdiction to adjudicate challenges to unlawful or unconstitutional agency action.

CONCLUSION

For the reasons stated, *amicus* AFL-CIO requests this Court to affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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INTRODUCTION

The purpose of this brief is to describe the nature of several of the class actions that were filed in several district courts during the 1986-87 legalization application period.[1] Each case challenged regulations or policies of general applicability on statutory or Constitutional grounds. None sought judicial review of individual applications; indeed, nearly all of the plaintiffs in these cases either had not yet filed applications or, if they had, their applications had not yet been acted upon. All of these cases asserted jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C § 1329.

There is a common characteristic reflected in all of these cases that is the result of the interplay between two provisions in IRCA. The first is the provision that imposes sanctions on employers who employ aliens that lack employment authorization.[2] The second are the provisions that grant a stay of deportation and employment authorization to legalization applicants who are prima facie eligible for legalization.[3] Since the regulations or policies challenged in each of the cases rendered class members ineligible as a matter of law, they were also automatically denied the statutory benefits of temporary work authorization and stays of deportation. While judicial review of "denials" of applications may be available under INA §§ 210(e) and 245A(f), these provisions obviously do not provide for judicial review of erroneous denials of the statutorily mandated grants of temporary stays of deportation and employment authorization. Furthermore, INS's refusal to issue temporary stays of deportation and employment authorization made judicial review under INA §§ 210(e) and 245A(f) highly illusory. The reason is simple---lacking the ability to work legally, most amnesty-eligible immigrants

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1 All parties have consented in writing to amici curiae's filing of this brief. See Exhibits 1 and 2 lodged herewith. All references to Exhibits, unless otherwise noted, are to amicus curiae's exhibits lodged concurrently herewith.

2 INA § 274A, 8 U.S.C. § 1324a.

3 INA §§ 210(d) & 245A(e), 8 U.S.C. §§ 1160(d) & 1255a(e).

would be driven out of the country by simple destitution before INS apprehension.

In every case we will address, the district court sustained the substantive challenge to the INS regulations or practices, or INS agreed to consent decrees granting effective relief. In virtually every case, INS's appeals to the courts of appeals have not contested the merits of the district court rulings but rather are limited to the jurisdiction of the district courts and their authority to grant equitable relief even if class members were injured as a result of the challenged regulations. In fact, in virtually every case INS subsequently (but too late) modified its challenged regulations.

These cases graphically demonstrate how the availability of district court jurisdiction enabled the judiciary to fulfill one its most critical functions under our governmental structure; that is, assuring that the executive branch of government adheres to the will of Congress. They demonstrate that it is not reasonable to ascribe to Congress an intention to prohibit the only form of judicial power that could, under the relatively unique circumstances applicable to IRCA, assure that the legalization program, as implemented, would remain within Congressional boundaries.

STATEMENT OF INTEREST OF AMICI

Amicus curiae the FARM LABOR ALLIANCE ("FLA") is a voluntary nonprofit association made up of the major agricultural grower associations in California, Washington and Oregon and organized under the laws of California in 1983. FLA was founded to promote the congressional adoption of a viable agricultural labor program as part of any immigration reform legislation enacted into

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law.[4] FLA took the lead in working with national agricultural groups in supporting the inclusion of the SAW program as part of IRCA.[5] The efficient and expeditious determination of SAW eligibility and resultant work authorization were critical to the establishment of a legal agricultural work force upon the imposition of employer sanctions. To facilitate this end, FLA members established one of the nation's largest Qualified Designated Entities (QDE) to assist farm workers in seeking legalization and, consequently, have firs hand experience with the SAW application procedures at issue in this case.

Although most farm workers providing services to FLA members have sought legalization through the SAW program, many have applied for amnesty under the general legalization provisions of IRCA and also may be affected by a broad decision of this Court denying district court jurisdiction in the LULAC, CSS, Zambrano and Ayuda cases addressed in this brief.

Amicus curiae CATHOLIC SOCIAL SERVICES OF SACRAMENTO, CENTRO DE GUADALUPE IMMIGRATION CENTER (CSS), is a non-profit organization providing, inter alia, social and legal assistance to immigrants seeking legalization under IRCA. CSS is a plaintiff in CSS v. Thornburgh, supra, challenging INS

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4 In creating the SAW program, congress responded to the needs of the perishable agricultural industry for an immediate legalized work force. It created a program with a narrow 18-month window of opportunity for individuals to apply for SAW status. The importance of the right to district court jurisdiction to challenge arbitrary agency actions is underscored by recognizing not only the individual rights at stake but also the disruption such action causes effected industries reliant upon the services of those individuals whose rights are abridged. Disruptions caused by the improper denial of legal status to entire groups of eligible Special Agricultural Worker (SAW) amnesty applicants would be exacerbated by the delay of several years required if these applicants were individually required to seek judicial review through the procedures set forth in INA § 210(e). The economic consequences would likely affect producers, food processors, marketers, transporters, wholesalers, retailers and consumers.

5 Consistent with this concern, the FLA filed an amicus brief in support of plaintiffs-appellees in CSS v. Thornburgh, 664 F.Supp. 1378 (E.D. Cal. 1987), appeals stayed pndg decision in McNary, CA NOS. 88-15046, 88-16127 & 88-15128 (9th Cir. 1990), wherein appellees challenged, among other things, INS's improper imposition of physical presence and residency requirements for applicants of the SAW program.

amnesty regulations. As a result of that litigation, thousands of applications have been reprocessed under lawful standards and tens of thousands of amnesty-eligible immigrants, who were erroneously excluded from participation during the application period under illegal (since modified) INS regulations, have been permitted to file "late" amnesty applications and receive temporary stays of deportation and employment authorization. *See* Ninth Circuit Order, Exhibit 3. A ruling in the instant case which denies district court jurisdiction in all amnesty-related cases, without the benefit of analysis of the injury suffered by CSS class members, would force the INS to **revert** approximately 50,000 *amnesty-eligible* CSS immigrants to illegal status.

Amicus curiae LEAGUE OF UNITED LATIN-AMERICAN CITIZENS (LULAC) is one of the oldest Hispanic membership organization in the United States. Its primary goals include the protection of the legal, political and cultural interests of Hispanic people. LULAC participated as a plaintiff in LULAC v. INS, Civ. No. 87-4757-WDK(JRx) (C.D. Cal.) (slip ops. Exhibit 4-5), appeal stayed pndg decision in McNary, CA NO. 88-6447 (9th Circuit), challenging INS amnesty regulations. As a result of that litigation, tens of thousands of amnesty-eligible immigrants, who were erroneously excluded from participation during the application period under illegal (since modified) INS regulations, have been permitted to file "late" amnesty applications and receive temporary stays of deportation and employment authorization. *See* Stipulated Stay Order, Exhibit 6. A ruling in the instant case which which denies district court jurisdiction in all amnesty-related cases, without the benefit of analysis of the injury suffered by LULAC class members, would force the INS to revert approximately 35,000 *amnesty-eligible* LULAC immigrants to illegal status.

Amicus curiae the AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) is a national organization of practicing lawyers and law school professors who practice and teach in the fields of Immigration and Nationality Law. AILA, its members and its members' clients have a direct and substantial interest in the outcome of this case.

Amicus curiae the AMERICAN G.I. FORUM is one of the largest nationwide Hispanic membership organizations in the United States. Among its primary purposes are the education of its members and advocacy on behalf of members and Hispanic people in the areas of civil and political rights. The American G.I. Forum has members and

assists non-members seeking amnesty under district court orders issued in LULAC and CSS, supra. *The question of whether these applicants will be processed for amnesty or reverted to illegal status may depend on this Court's decision in the instant case.*

Amicus curiae the the MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (MALDEF) is a national non-profit legal advocacy organization working to promote the civil rights of Hispanics in the areas of immigration, education, employment and political rights. MALDEF is a plaintiff in Ayuda v. Thornburgh, 687 F.Supp. 650 (D.D.C. 1988), vacated in part, 880 F.2d 1325 (D.C. Cir. 1989), pet. for cert. pndg., No. 89-1018. As a result of that litigation, thousands of applications have been reprocessed under the correct standards and approximately 6,000 amnesty-eligible immigrants, who were erroneously excluded from participation during the application period under illegal INS regulations, have been permitted to file "late" amnesty applications. A ruling in the instant case which which denies district court jurisdiction in all amnesty-related cases, without the benefit of analysis of the injury suffered by Ayuda class members, would force the INS to revert approximately 6,000 *amnesty-eligible* Ayuda immigrants to illegal status.

Amicus curiae WASHINGTON ASSOCIATION OF CHURCHES ("WAC") is an ecumenical organization of several denominations which has as one of its purposes to assist persons applying for legalization through its statewide legalization project which obtained QDE status. The Washington Association of Churches is a plaintiff in Immigrant Assistance Project (IAP) v. INS, 709 F.Supp. 998, 717 F.Supp. 1444 (E.D. Wash. 1989), appeal stayed pndg decision in McNary., CA Nos. 89-35345, 89-35593 (9th Cir.). The district court in IAP held INS amnesty regulations to be in violation of the amnesty statute and the due process clause of the Fifth Amendment, and ordered INS to reprocess several thousand cases. The reprocessing of these cases has been stayed pending the outcome of INS's appeal in IAP.

Amicus curiae TRAVELERS AND IMMIGRANTS AID OF CHICAGO ("TIA") is a QDE authorized by INS to accept and process legalization applications. It is one of the largest QDE's in Chicago and has provided assistance to thousands of amnesty applicants in the Chicago area. TIA is a plaintiff in IAP. Many of its clients are affected

by the rulings in CSS, LULAC, Ayuda and IAP. *Whether these applicants will be processed in accordance with the amnesty statute or returned to illegal status may depend on the Court's ruling in this case.*

Amicus curiae the AMERICAN FRIENDS SERVICE COMMITTEE (AFSC) is an independent Quaker organization which conducts programs of service, justice and peace through its headquarters in Philadelphia, nine regional offices across the U.S., and program operations in 30 countries abroad. AFSC has assisted numerous immigrants seeking amnesty under IRCA, including applicants whose eligibility may be affected by the manner in which the Court decides the instant case.

Amicus curiae CATHOLIC CHARITIES OF LOS ANGELES, INC., is a multi-service agency with 850 employees and 3,500 volunteers servicing over 290,000 clients per year, many on immigration matters. It has assisted tens of thousands of applicants in the amnesty process, including hundreds benefitted by the district court orders issued in CSS, LULAC, Ayuda and IAP. CATHOLIC CHARITIES is concerned that this Court's ruling in the instant case may affect the legalization rights applicants under the district court orders issued in CSS, LULAC, Ayuda and IAP.

Amicus curiae LEOQUILDO VALLE is a plaintiff in a class action case, Lopez v. Ezell, 716 F.Supp. 443 (S.D. Cal. 1989). He is eligible for SAW status and filed a preliminary application on May 4, 1988 at the Calexico port-of-entry in California. He was issued INS form I-94 authorizing entry into the U.S. for 90 days to complete his application. When he subsequently attempted entry, he was detained and, without a hearing or cause, his I-94 was confiscated. The ruling of this Court in the instant case may affect the relief he and his class members won in Lopez.

Amicus curiae SOFIA BAEZ de HUERTA is a plaintiff in CSS, supra. She is eligible for amnesty. On May 10, 1987 she visited her mother for Mother's Day in Mexico for five hours. As she did not have INS permission to depart the U.S., under the regulation challenged in CSS her brief absence rendered her automatically ineligible for amnesty. The manner in which this Court rules in the instant case may affect the district court relief she and her class members won in CSS.

Amicus curiae ANNA R. is a plaintiff in the class action Zambrano v. INS, No. S-88-455 (E.D. Cal. 1988), appeal stayed pndg

decision in McNary., CA Nos.88-15438, 88-15533 (enjoining INS regulation denying eligibility to applicants if any immediate family ever received "public cash assistance"). She has two U.S. citizen children and is eligible for amnesty. The manner in which this Court rules in the instant case may affect the district court relief she and her class members won in Zambrano.

ARGUMENT

DISTRICT COURTS HAVE PROPERLY ASSUMED JURISDICTION OVER SEVEN CHALLENGES TO INS REGULATIONS WHICH, IN BLANKET FASHION, AUTOMATICALLY BUT ILLEGALLY HELD INELIGIBLE ENTIRE GROUPS OF IMMIGRANTS FROM PARTICIPATION IN THE AMNESTY PROGRAM

If this Court finds that the district courts, across-the-board, lacked jurisdiction to remedy injuries cause by illegal and unconstitutional INS regulations implementing the amnesty statute, then over 100,000 amnesty-eligible applicants will be returned to illegal status, unable to work lawfully and subject to deportation at any time. To do so would be directly contrary to the legislative intent to enact a generous one-time legalization program, allowing "INS to target its [future] enforcement efforts on new flows of undocumented aliens and, in conjunction with the proposed employer sanctions programs, help stem the flow of undocumented people to the United States." H. Rep. No. 682(1), 99th Cong. 2d Sess. at 49. A "liberal and generous" implementation of the legalization program is "necessary to ensure true resolution of the problem and to ensure that the program will be one time only." Id. at 72.

As we will show, district courts in seven class action cases have assumed jurisdiction over *successful* challenges to blanket INS regulations which automatically and illegally deemed entire classes of applicants ineligible, and, therefore, also ineligible for temporary stays of deportation and employment authorization. There is no doubt but that the procedures set out in INA §§ 210(e) and 245A(f), to obtain judicial review of denials of applications, *would have been unavailable to the vast majority of applicants involved in these seven district court actions.* In each of these cases the effectiveness of district court review cannot be gainsaid -- in virtually every case INS modified its challenged regulations and reprocessed all applicants erroneously denied. It only refused to extend any remedy (and has opposed judicial remedies) for eligible applicants who did not effect a timely "filing" solely because

their applications were erroneously rejected or they were discouraged from filing by (now modified) illegal regulations.[6]

1. United Farm Workers of America v. INS

In United Farm Workers of America (UFW) v. INS, Cv. No. S-87-1064 LKK/JFM (E.D. Cal.), plaintiffs, the UFW and 13 individuals, filed a district court class action primarily challenging policies adopted in INS's adjudication of SAW applications. After obtaining preliminary relief on one of their causes of action,[7] plaintiffs amended their complaint raising several of the same claims in the 25 states and territories in the INS Western and Northern Regions which had been successfully litigated in Haitian Refugee Center v. McNary and implemented in the INS Southern Region without appeal in the instant case.

In 1988, the district court issued an order which, while denying plaintiffs' motion for preliminary relief, agreed with plaintiffs'

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6 Amici believe that a "case or controversy" remains in CSS, Ayuda, LULAC, Zambrano, Lopez and IAP. In the first four, it only remains because INS has refused to acquiesce in court orders allowing "late" filings of amnesty applications (even in these cases INS has acquiesced in the merits of the district court decisions as to class members who filed timely). In IAP no extension was ordered, but INS is holding "in abeyance" the processing of applications while appealing portions of the merits of the district court orders. In Lopez, a partial settlement has been stipulated to and ordered, but some issues remain to be litigated. In contrast, as argued in respondents' opposition to petition for writ of certiorari, the lower court's orders in this case "have largely been completed." Bf for the Respondents in Opposition at 26. To the extent they have not, no case or controversy is presented since INS has agreed to (and is) conducting re-interviews for whatever additional class members might be identified in the future.

7 Plaintiffs obtained a preliminary injunction requiring the INS to comply with the SAW statute which required the agency to promulgate regulations authorizing the issuance of subpoenas for the timely production of farmworker amnesty applicants' employment records. UFW v. INS, No. Cv. S-1064 LKK (E.D. Cal. May 13, 1988). INS had not issued such a regulation making it impossible for many farmworkers to establish their eligibility. INS, in compliance with the preliminary injunction, eventually promulgated a regulation two months after the close of the application period. 8 C.F.R. § 210.3(b)(4), 54 Fed. Reg. 4756 (Jan. 31, 1989). This order was not appealed by the INS.

interpretation of the law on two issues. First, the court held that (1) INS was required "to enunciate specific reasons why a SAW application has been denied,"[8], and (2) the district court articulated the standard of proof (id. at 18-19) later incorporated into a district court approved class certification and settlement. The settlement provided the relief sought by plaintiffs in three of five claims, one being the claim, also raised in the present case, that INS policy misapplied the "just and reasonable inference" standard on the burden of proof applied in adjudicating applications.[9] The parties stipulated to a class of all SAW applicants in the Western and Northern Regions whose applications had been rejected, denied, or not finally processed by the regional INS offices. Settlement at § I, rep'd in 66 INTERP. REL. 464 et seq. (Apr.24, 1989).

According to INS reports submitted to plaintiffs' counsel pursuant to the settlement, id. at ¶ V(f), approximately 17,000 class members' applications meeting certain threshold requirements have been reviewed under the terms of the settlement and thousands of class members were granted employment authorization and stays of deportation pending review.

Recognizing the scope and significance of the judicial review limitations contained in INA §§ 210(e) and 245A(f), the parties in UFW stipulated that "[n]othing in this settlement shall be construed as permitting a district court to make individual determinations on individual applications." Id. at ¶ V(b).

After the settlement was conditionally approved by the district court in April 1989, INS issued a nationwide cable to its field offices which stated:

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8 "[P]laintiffs have correctly articulated the extent of INS's obligations in this regard." UFW v. INS, No. S-87-1064 LKK (E.D. Cal.) (Memorandum Order of Nov. 17, 1988, at 7-8).

9 The "just and reasonable inference" standard is set forth in INA § 210(b)(3)(B)(iii). Under the settlement, SAW applicants could meet their burden of proof by submitting some credible documentation along with their own personal testimony verifying that they worked the requisite number of days to meet SAW eligibility. The settlement is consistent with the legislative history. H. Rpt. No. 99-1000(I), cited in U.S. Code Cong. & Admin. News at 5840, 5843.

> Although the court decision [in UFW v. INS] directly affects only the Northern and Western Regions, the standards on burden of proof, specificity of denial notices and adverse evidence [the three claims incorporated in the settlement] apply to SAW applications nationwide and should be reviewed by all persons adjudication SAW applications.

Cable of May 2, 1989 (CO-1588-C), rep'd in 66 INTERP. REL. 573-74 at 574 (May 22, 1989).

District court review in UFW, just as in the instant case, was the only rational manner in which thousands of eligible applicants could obtain the important statutory benefit granted by Congress. Once it was recognized that they were not ineligible, their applications were processed (or reprocessed if previously denied), they were issued temporary stays of deportation and employment authorization, and in every way were "on track" emerging from illegal status precisely as intended by Congress.

Under the approach argued by the INS in the instant case, ironically after granting relief to class members just as it did pursuant to settlement in UFW, (1) tens of thousands of applicants would have been erroneously denied, (2) applicants statutorily eligible to regularize status would have been erroneously denied temporary stays of deportation and employment authorization, (3) these applicants would eventually have had to be arrested, (4) discretion exercised by INS to initiate deportation hearings in their cases, (5) Immigration Judges throughout the country would have had to conduct tens of thousands of useless deportation hearings (lacking jurisdiction over review of the erroneous denials of legalization),[10] (6) the Board of Immigration Appeals would have had to review tens of thousands of cases (lacking jurisdiction over review of the erroneous denials),[11] and (7) the Courts of Appeals would then have

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10 *See* 8 C.F.R. § 103.3(a)(2)(iii) ("No further administrative appeal shall lie from [the amnesty] decision, nor may the [amnesty] application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings."). See also Ayuda v. Thornburgh, supra, 880 F.2d at 1332 n. 7 ("Facial challenges to the regulation [in a proceeding before the LAU] are not permitted"); Matter of Fede, Interim Dec. 3106 at 2-3 (BIA 1989) ("A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges . . .").

11 See footnote 8, supra.

been required to review thousands of petitions for review. INS, as is its practice, would not necessarily follow one Circuit's decision when operating in other circuits, and circuits might disagree, prompting Supreme Court review. Aside from the fact that this approach requires tens of thousands of useless arrests, administrative hearings and review, at an obviously enormous cost to the INS, it also delays indefinitely the eligible applicants' grant of statutorily mandated temporary stays of deportation and employment authorization. Congress intended the very opposite -- an efficient and quickly resolved amnesty program. S.Rep. No. 132, 99th Cong., 1st Sess. 48 (1985).

2. Lopez v. Davidian[12]

Plaintiffs in this district court case are, inter alia, "preliminary" SAW applicants,[13] who were subsequently detained by Border Patrol agents and had their application documents improperly confiscated. A consent order was stipulated to by the INS and plaintiffs resolving most of the substantive issues raised in plaintiffs' complaint. Lopez v. Ezell, 716 F.Supp. 443, 444 (S.D. Cal. 1989); Consent Order (CV. No. 1825 JLI) (May 1, 1989) at ¶ 2 (Exhibit 7).

The consent order certified a class of would-be SAWs whose travel and work documents were confiscated at ports of entry or checkpoints in the Western and Southern Regions before their applications had been finally adjudicated. Id. The consent order allows preliminary applicants additional time to complete their applications and file the supporting documentation. Id. at ¶ 6. Pending adjudication of their individual applications, Lopez class members are being issued replacement documents and temporary employment authorization by the INS.

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12 This case was filed as Lopez v. Ezell. INS Regional Commissioner Davidian was substituted for Ezell when he replaced Mr. Ezell in office.

13 Preliminary applications were filed by persons at designated ports of entry to allow expedited processing for those who were outside the country when the SAW application period commenced. These applicants were admitted for 90 days to allow them to work and collect sufficient documentation to complete their applications. See 8 C.F.R. § 210.2(c)(4). They were provided an INS form "I-94" evidencing their status in the U.S., work authorization and stays of deportation.

Again, as in UFW and the instant case, district court review was the only effective vehicle to remedy the challenged (later modified) INS policy. There was no other judicial procedure to remedy the impact of INS's policy on class members' statutory right to immediate temporary stays of deportation and employment authorization. As in several of the cases discussed infra, class members had not received final "denials" making judicial review under INA § 210(e) impossible. In fact, the INS agreed that disputes over the consent order could be reviewed by the district court. Exhibit 7, at ¶ 10.

3. Catholic Social Services v. Thornburgh

In CSS, plaintiffs challenged INS regulations and policies which (1) made ineligible for legalization all applicants who travelled outside the U.S. during the application period *without prior INS permission*, and (2) denied employment authorization to eligible applicants apprehended by INS prior to the enactment of IRCA or who, after enactment, surrendered to the agency. The statute specifically authorized "brief, casual and innocent absences" during the application period, INA § 245A(a)(3), 8 U.S.C. § 1255a(a)(3), and also mandated temporary employment authorization to all persons prima facie eligible for legalization. INA §§ 210(f) and 245A(e).

The first national legalization instruction (INS Legalization Wire #1), explicitly stated that Catholic Social Services class members who briefly travelled after IRCA's enactment without prior INS permission were statutorily "ineligible . . . [and] are to be processed for deportation." Clerk's Record 47 (in CSS), Pl. Ex. A p. 2.[14] After INS published its final legalization regulations on May 1, 1987,[15] it issued a further telex instruction to all its employees: "[a]ny alien whose last

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14 References in this section of the brief to the Clerk's Record ("C.R."), followed by the appropriate docket entry and a page or paragraph citation, are to the Clerk's Record on file with the Ninth Circuit Court of Appeals in CSS v. INS.

15 INS's position that class members were statutorily ineligible for legalization was formalized in the agency's final regulations, 8 C.F.R. section 245a.1(g). Enforcement of this regulation was enjoined by the district court just days before expiration of the 12-month application period; defendants have not appealed that final injunction.

entry was after May 1, 1987 [i.e. class members in this case] will be considered ineligible to apply for legalization."[16]

The INS Legalization Manual, used by INS employees and non-profits ("Qualified Designated Agencies") that contracted with the INS to process legalization applicants provides: "[I]f the applicant . . . is statutorily ineligible, the application will be rejected . . ." Exhibit 8 (emphasis added).

Instead of being granted employment authorization and a stay of deportation, class members were often placed in deportation proceedings or expelled from the country. For example, class member Juan Anselmo Torres-Rivas, who was eligible for legalization, was deemed ineligible because of an absence after the enactment of IRCA and therefore "was taken to the U.S. Border patrol station in Laredo, Texas, made to sign a form, and on the same day I was taken to the International Bridge, and told to leave the United States. The INS then made me walk across the bridge into . . . Mexico."[17]

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16 CR 148, Pl. Ex. NNNN (Wire #14) at 4 (emphasis added). Farmworker legalization applicants who travelled without INS advance parole were accorded the same treatment: "The screening process that occurs upon receipt of the application should include a quick review of the applicant's entry date. If the entry date is after June 26, 1987, the application should be rejected," that is, not even permitted to be filed. CR 115 Pl. Ex. BBB (emphasis added). Consistent with written policy, these applications were "automatically reject[ed] . . ." CR 145, Pl. Ex. CCCC, para. 3.

17 CR 148, Pl. Ex. KKKK, para. 7 (emphasis added). Class member Maria Noriega, who qualified for legalization, was apprehended by the INS in Phoenix, Arizona. CR 148, Pl. Ex. JJJJ, para. 5. She had briefly travelled without INS advance parole and was therefore (the agency now concedes improperly) considered ineligible by the INS. Id. Instead of being offered an opportunity to apply for legalization, she was "told she was not eligible for legalization due to her reentry . . . After having been advised by the [INS] officials that she was not eligible for legalization and that she would be held in jail on a high bond, Mrs. Noriega signed a form I-274 requesting a voluntary return to Mexico." Id. para. 6. Because there was "a great lack of consistency among different Legalization offices," CR 133, Pl. Ex. XXX, some class members actually proferred and had accepted timely applications. These applications were routinely denied by the INS. *See, e.g.*, CR 145, Pl. Ex. DDDD, para. 13, Exhibit FFFF, para. 11. INS has now agreed to reprocess all timely filed applications in a manner consistent with the district court's summary judgment and remedial orders.

On March 23, 1987, the parties reached a nation-wide settlement pursuant to which the INS agreed to grant temporary employment authorization to persons prima facie eligible for legalization who were apprehended by the INS prior to the enactment of IRCA, and those who voluntarily surrendered to the INS. Stipulation of Partial Settlement in Class Action, Exhibit 9, p. 2 of the Notice attached to the Stipulation.

On June 17, 1987, the district court issued a preliminary injunction enjoining INS's exclusion and deportation of SAW workers who briefly, but without prior INS permission, departed the country after the enactment of IRCA. CSS v. Meese, 664 F.Supp. 1378 (E.D. Cal. 1987). INS took no appeal from that decision.

On May 3, 1988, the District Court granted plaintiffs' motion for summary judgment explaining that INS's "final regulation [requiring that all post-enactment absences be authorized by the agency]. . . is invalid as inconsistent with the statutory scheme and hence is unenforceable." Exhibit 10 [18] On June 10, 1988, the District Court entered an Order granting relief to class members. Exhibit 11.

INS did not appeal the merits of the district court's summary judgment decision -- in fact, *the INS subsequently modified its regulation and reprocessed the applications of all class members who had timely filed.* INS's appeal to the Ninth Circuit is limited to the jurisdiction of the District Court and its authority to grant equitable relief to class members who failed to file timely applications solely because of INS's illegal regulation.

For the majority of CSS class members there would never have been judicial review had the district court not assumed jurisdiction. The vast majority of CSS class members protected from deportation by the court's order would never have been able to appeal "denial[s]" of their applications through the procedures set forth in INS § 245A(f), as they never received "denial[s]." *Because of INS's illegal regulation, approximately 50,000 never even got applications on file.*[19]

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18 On the same date the District Court issued an Order amending the class definition to include all prima facie eligible applicants who departed the U.S. after the enactment of IRCA for reasons that were brief, casual and innocent but without the prior permission of the INS as required by its illegal regulation.

19 Section 1255a(f)(3)(B) provides that judicial review of amnesty denials shall be determined on "the administrative record established at the

District court jurisdiction was also appropriate given that CSS class members had no protection from arrest and deportation because INS *deemed them ineligible* for amnesty and therefore equally ineligible for the mandatory statutory protections of stays of deportation and temporary employment authorization. INA §§ 210(d) & 245A(e), 8 U.S.C. §§ 1160(d) & 1255a(e).

4. LULAC v. INS

LULAC v. INS, NO. 88-6447 (9th Cir.) involves a challenge to INS's blanket, non-individualized policy of automatically deeming ineligible for legalization immigrants who briefly departed the United States during the required period of continuous unlawful residence (commencing January 1, 1982), and returned to unrelinquished, unlawful residences in the U.S. using non-immigrant visas or other INS documentation.[20] Memorandum Decision and Order, Exhibit 4. Under INS's regulation, only those aliens who returned from brief trips clandestinely evading INS inspection, were deemed not to have broken their unlawful residence in the United States. This policy clearly violated the eligibility criteria as mandated by Congress -- it virtually eliminated European, Asian, South American and African applicants from eligibility in the legalization program. The legalization program was effectively limited to nationals from Mexico and Central America -- those who traditionally leave and return clandestinely without inspection.

In July 1987, three months into the 12-month application period, six individual amnesty applicants and ten community and legal services organizations involved in assisting amnesty applicants filed the LULAC suit challenging INS's regulation.

INS defended its policy, arguing that the statutory requirement of continuous "unlawful" residence was not met when an alien unlawfully residing in the United States briefly travelled outside the country and returned unlawfully using a visa or INS documentation. INS incredibly asserted that the illegal alien's return, unlawfully using documentation, was "constructively" lawful (since documentation was

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time of the determination on the application . . ." CSS plaintiffs and class members never received a "determination on the application . . ." Nor is there an "administrative record" in their cases.

20 8 C.F.R. § 245a (May 1, 1987).

used), and therefore broke the alien's required "unlawful" residence in the country. Exhibit 4, at 2.[21]

This illegal policy was vigorously defended and adhered to for approximately seven months of the 12-month application period. Class members were considered "statutorily ineligible," discouraged from filing applications, and INS legalization officers were instructed to--and did--reject their applications without permitting a formal filing. See Exhibit 8.

After opposing appellees' motion for summary judgment, and filing a motion to dismiss, the INS finally relented and rescinded the challenged policy.[22] However, by the time the policy was rescinded,[23] the statutorily mandated educational outreach program which INS conducted for tens of thousands of potential applicants and community groups had long been completed.[24] The declaration of Catholic Charities of Los Angeles is typical:

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21 INS's bizarre regulation ran directly counter to an unbroken line of cases in which the Attorney General, the INS, the Board of Immigration Appeals, and the courts had held that an entry accomplished with a visa or other INS documentation is unlawful when the alien made material misrepresentations in the visa application or at the time of his/her request for admission to the country. See, e.g., Brownell v. Carija, 254 F.2d 78, 80 (D.C. Cir. 1957); Matter of I.L., 7 I&N Dec. 233 (BIA 1956); Matter of Martinez-Lopez, 10 I&N Dec. 409 (Atty Gen. 1964).

22 The policy was not formally reversed until seven months into the 12-month application period. INS memoranda released in response to plaintiffs' discovery requests indicate that the policy was rescinded, inter alia, "to alleviate the situation created by the [LULAC] lawsuit," C.R. 29 at 158, and "may overcome [this] pending litigation." Id. at 159. References in this section of the brief to the Clerk's Record ("C.R."), followed by the appropriate docket entry and a page or paragraph citation, are to the Clerk's Record on file with the Ninth Circuit Court of Appeals in LULAC v. INS.

23 8 C.F.R. section 245a.2(b)(9), (10), reprinted in, 52 Federal Register 43843 (Nov. 17, 1987).

24 INA § 201(i) provides that "the Attorney General, in cooperation with qualified designated entities, shall broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits." Under this section INS "broadly disseminated" information regarding its illegal regulation.

> Until November 17, 1987, it was the formal policy of the INS to deem ineligible for legalization any alien who had after January 1, 1982 briefly departed the United States and returned improperly using a non-immigrant visa. Consistent with its final regulations, the INS advised QDEs . . . that potential applicants who briefly departed the United States after January 1, 1982 and returned improperly using non-immigrant visas were ineligible for legalization. QDEs . . . recommended to many applicants that they not file legalization applications because they were deemed statutorily ineligible by the INS . . .
>
> The majority of applicants are basically unfamiliar with their rights under the IRCA and have heavily relied upon information disseminated . . . by the INS, or information provided by QDEs . . . Most applicants speak Spanish or Asian languages rather than English, and the majority of applicants have little formal education. The vast majority of publicity regarding INS' eligibility criteria was issued in May 1987, when the policy was to deny legalization to the proposed class members . . . Very little publicity was generated regarding INS change in policy, formalized on November 17, 1987 . . .[T]housands of people failed to learn about the change in policy, and, therefore, did not file applications by May 4, 1988.

CR 78, Exhibit 9, ¶¶ 5-6 (emphasis added).

On July 15, 1988, the district court granted partial summary judgment in favor of appellees. Exhibit 4. The court pointed out that "IRCA expressly permits an alien to leave the United States for brief periods of time." Id. at 8, citing 8 U.S.C. § 1255a(g)(2)(A). The court concluded that the challenged regulation "conflicts with the plain meaning of the statutory scheme." Id. at 12.[25]

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25 The district court also analyzed the legislative history of the legalization statutes and concluded that defendants' "reentry" policy was "inconsistent with Congress' intent when it enacted IRCA." Id. at 15.

The district court, on August 12, 1988, ordered the INS to accept and process applications filed by class members through November 30, 1988. Exhibit 5; C.R. 70.[26]

INS filed a notice of appeal, not on the merits, but solely challenging the jurisdiction of the district court and its authority to grant equitable relief to class members. A stipulated stay was entered which currently *allows LULAC class members to file applications with the INS and receive temporary stays of deportation and employment authorization cards*. Exhibit 6. Approximately 35,000 applications have been filed under the stipulated stay order.[27] Further consideration of LULAC has been stayed by the Ninth Circuit pending decision in the instant case.

For the LULAC class members there would never have been judicial review had the district court not assumed jurisdiction. The LULAC plaintiffs and class members protected from deportation by the court's order would never have been able to appeal "denial[s]" of their applications through the procedures set forth in 8 U.S.C. § 1255a(f), as they never received "denial[s]." *Because of INS's illegal regulation, coupled with the agency's policy, as set forth in its Legalization Manual, of rejecting applications from persons deemed "statutorily ineligible," tens of thousands of LULAC class members never even got applications on file.*[28]

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26 The district court enjoined INS from "refusing to accept" applications filed by class members through November 30, 1988. Id. at 9. The court further ordered INS to prepare "appropriate procedures to determine whether an applicant claiming to fall within subclass one indeed legitimately does." Id. The court enjoined INS from deporting subclass one members until they had "adequate time to apply for legalization." Id. at 10.

27 Given their unique circumstances, whether these class members and their families will be permitted to continue their lawful, above-ground lives, now documented by the INS, or must return to their previous illegal, underground lives, should not be determined by this Court's disposition in the instant case.

28 Section 1255a(f)(3)(B) provides that judicial review of amnesty denials shall be determined on "the administrative record established at the time of the determination on the application . . ." LULAC plaintiffs and class members never received a "determination on the application . . ." There is no "administrative record" in their cases.

District court jurisdiction was also appropriate given that LULAC class members had no protection from arrest and deportation because INS *deemed them ineligible* for amnesty and therefore equally ineligible for the mandatory statutory protections of stays of deportation and temporary employment authorization. 8 U.S.C. § 1255a(e)(2).

The notion that Congress intended the approximately 200,000 LULAC class members, including 35,000 who did not effect timely filings, to wait to be apprehended, placed in thousands of deportation hearings, found deportable, file over 100,000 appeals to the BIA, and finally file tens of thousands of petitions for review in the Courts of Appeals (all while not being authorized to work) in order to obtain judicial review of the legality of one INS regulation is preposterous. Congress could not possibly have intended such a chaotic, confusing and costly mechanism to review the legality of one INS regulation. In any event, INS has never explained how the 35,000 LULAC class members who did not file timely applications solely because of INS's illegal regulation could avail themselves of the appellate review procedures described in Section 1255a(f) since they never received "denial[s]" which could be reviewed in the Courts of Appeals.

5. Ayuda v. Thornburgh

On March 8, 1988, four non-profit organizations providing assistance to amnesty applicants and five individuals filed suit in the district court for the district of Columbia challenging a blanket INS policy, which deemed ineligible for amnesty, applicants unless their illegal status was known to the INS prior to January 1, 1982. Ayuda v. Thornburgh, 907 F.Supp. 998 (D.D.C. 1988). The relevant statute, 8 U.S.C. § 1255a(a)(2)(B), required only that an applicant's illegal status must have been "known to the Government" prior to January 1, 1982.[29]

By Order dated March 30, 1988, District Judge Stanley Sporkin ruled that Section 1255a(a)(2)(B) was "crystal clear" and "[t]hroughout the text of IRCA, Congress exhibits its ability to differentiate between

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29 The challenged regulation required not only that the applicant's illegal status was "known to the INS," rather than "to the Government," but also that the information "known to the INS" was "stored or otherwise recorded in the official Service alien file." 8 C.F.R. § 245a.1(d)(May 1, 1987).

the 'INS' and the 'Government." Id. at 661. The court continued that "IRCA is plainly not a statute where Congress used the term 'Government' to refer to the agency [INS] charged with administering the Act." Id. at 661-62.

The district court further ruled that it possessed jurisdiction because, inter alia, "[n]o administrative remedy exists for [the] organizational plaintiffs to resolve the conflict between . . . the plain meaning of the statute on the one hand and the INS' narrow interpretation of the 'known to the Government' requirement on the other." Id. at 660. The district court also carefully analyzed the standing of the organizational and individual plaintiffs. As to the organizational plaintiffs, the district court concluded that because of INS's illegal regulation, the "plaintiff-organizations are handicapped in their ability to perform their core function -- immigration counselling." Id. at 656. The court further determined that the INS's illegal regulation made "immigration counseling tasks much more complex, burdensome and time consuming . . . [and] [t]he organization[-plaintiffs'] resources are being needlessly squandered because of the INS' regulation." Id.[30]

The district court enjoined INS from continuing to apply its illegal regulation, and further ordered INS to "take steps to notify promptly all persons affected by the regulation in question of this court's determination." Id at 666. The INS acquiesced in the Court's interpretation of the statute and did not appeal its Order. *See* Ayuda, Inc.v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

Subsequently, on April 7, 1988, the district court issued Supplemental Order II, requiring the INS to reopen the cases of any applications for legalization applications improperly denied under INS's illegal regulation. Ayuda, Inc. v. Meese, 687 F.Supp. at 667. INS

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30 The district court recognized that the illegal regulation placed the Qualified Designated Entities (QDEs) in an "intolerable and conflicting position." Id. at 657. Under contract with the INS, the QDEs were authorized under IRCA to accept fees for amnesty applications (average fee $200). Id. INS's contract with the QDEs "requires the staff of QDEs to comply with all INS regulations relating to the legalization program." Id. Thus, QDEs, including some of the Ayuda organizational plaintiffs, were forced to counsel eligible applicants that they were ineligible under INS's illegal regulation and could not, consistent with their INS contracts, accept and process applications proferred by eligible class members.

likewise acquiesced in this ruling and did not appeal. *Those cases have now been reopened and reprocessed.*

On May 2, 1988, two days before the filing deadline, the district court entered Supplemental Order V, which enjoined INS from denying legalization to applicants who violated their status prior to January 1, 1982 by failing to comply with the mandatory quarterly or annual registration requirements of former INA § 265. Id. at 668. Portions of this Order were appealed and, in a 2-1 decision, the D.C. Circuit vacated the district court's Order on the ground that the judicial review provisions of 8 U.S.C. § 1255a(f) precluded district court review. Ayuda v. Thornburgh, supra, 880 F.2d 1325.[31] Plaintiffs' petition for rehearing en banc was denied by an Order in which four separate opinions issued.[32] Plaintiffs thereafter filed a petition for a writ of certiorari before this Court, No. 89-1018, which petition is still pending.[33]

In the district court, plaintiffs also established that a large number of amnesty-eligible immigrants were not informed of the district court's Order of March 30, 1988 in the one month left between the date of its issuance and the end of the application period. Therefore, the district court, on June 9, 1988, issued Supplemental Order IX, allowing putative class members whose applications were rejected for filing, or who were discouraged from filing by INS's illegal regulation, to file

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31 Chief Judge Wald filed a dissent in which she stated that the judicial review provisions of IRCA did not preclude the District Court's exercise of federal question jurisdiction under 28 U.S.C. § 1331, and 8 U.S.C. § 1329 to invalidate INS legalization rules. Id. at 1366.

32 Four of the nine active judges voted to rehear the case en banc. Ayuda, Inc. v. Thornburgh, No. 88-5226 (D.C. Cir. Oct. 4, 1989) (order denying rehearing en banc). In addition, however, Circuit Judge Buckley stated that he was inclined to agree with the dissent's analysis of the jurisdictional issue but due to his own views on the other issues in the case, he concurred in the denial of rehearing, because to do otherwise would "raise false hopes among the appellees while denying them the opportunity for prompt review by the Supreme Court." Id., (Opinion of Buckley, J.).

33 The petition for certiorari was filed in December 1989. The INS, in its response, requested that a decision on the petition be stayed pending disposition of the instant case. Brief for Respondents at 23. No further action by this Court has been taken.

applications through August 1988. Ayuda, Inc. v. Meese, 687 F.Supp. at 671. Approximately 6,000 amnesty-eligible applicants have filed applications under Ayuda.

6. Immigrant Assistance Project v. INS

In Immigrant Assistance Project v. INS, supra, the plaintiffs, including the Washington Association of Churches and several QDEs and individual amnesty applicants, filed suit in the district court on behalf of three separate categories of individuals applying for legalization. On March 6, 1989 district court Chief Judge Barbara Rothstein granted summary judgment in favor of the plaintiffs on virtually all substantive issues affecting the three categories of legalization applicants. Immigrant Assistance Project v. INS, 709 F.Supp 998 (W.D. Wash. 1989).[34]

Category 1 includes applicants whose illegal status was "known to the Government" prior to January 1, 1982, as required by the amnesty statute, because they failed to register their addresses with the INS on a quarterly basis as required INA § 265, 8 U.S.C. § 1305; see also 8 C.F.R. § 265.1 (1973).[35] The district court ordered INS to process these several thousand applications which the INS was holding "in abeyance" within ninty days, or alternatively to notify the applicants of the court's orders and of the need to remain in contact with the INS. 717 F.Supp. at 1448.[36]

Category 2 includes applicants originally admitted to the U.S. on non-immigrant H (temporary workers), L (intra-company transferees) or F (students on duration of status) visas. These applicants, unlike identically situated applicants who entered the U.S. on other non-immigrant visas, were required to meet impossible standards

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34 On June 6, 1989 the court granted in part plaintiffs' request for a supplementary order. Immigrant Assistance Project v. INS, 717 F.Supp 1444 (W.D. Wash. 1989).

35 The district court held that willful violations of § 265 were not merely technical, but rather "made an alien's status unlawful and therefore made [the alien] eligible for legalization under the 'known to the government' standard." 709 F.Supp at 1001.

36 The district court subsequently stayed its orders pending the outcome of INS's appeal to the Ninth Circuit.

of proof (including the production of documents INS had destroyed) to establish that their unlawful status was "known to the Government" prior to January 1, 1982. 709 F.Supp 1002. The district court concluded "congress in IRCA made no similar distinction among types of visas . . . INS has created an irrational distinction among legalization applicants . . . [which] violates the equal protection guarantee." 709 F.Supp.1002-3. The district court granted prospective relief to Category 2 applicants, requiring INS to process their applications in a manner consistent with IRCA and Fifth Amendment due process. Id.

Category 3 applicants consists of aliens who, "by misrepresentation or mistake, [were] incorrectly reinstated to lawful status sometime after January 1, 1982." 709 F.Supp. at 1003. INS argued that despite the fact that the reinstatement was accomplished by fraud or misrepresentation, such reinstatement broke the alien's "unlawful" residence. Id. The district court disagreed, holding that the granting of an immigration benefit through fraud or misrepresentation did not break the alien's unlawful residence.[37] In Matter of N, Int. Dec. 3080 (Commr, Sept. 26, 1988), long after thousands of Category 3 applications had already been rejected or denied, the INS finally ruled in favor of an applicant in Category 3. INS agreed only "that this ruling serves as precedent for future [agency] decisions . . ." Id. (emphasis added). However, Matter of N "does nothing for those applicants previously [rejected or] denied." 709 F.Supp. at 1003. The district court therefore found justification for "requiring the INS to reopen category 3 cases denied prior to Matter of N." Id.

INS argued in IAP that the district court was without jurisdiction under 8 U.S.C. § 1255a(f)(4)(A). Order Denying in Part and Granting in Part Defendants' Motion to Dismiss (Nov. 3, 1988) (Exhibit 12, p. 10). The district court pointed out that "[p]laintiffs here challenge the policies and practices of the INS, namely the refusal of the INS to grant legalization [and temporary stays of deportation and employment authorization] to those applicants who violated the reporting provisions

37 The record indicates that as many as several thousand people fall into Category 3. See Clerk's Record on file with the Ninth Circuit in IAP, CR 88, D76:11-25. These applicants have been advised by the INS that they are ineligible. Id., D78:22-23. See also id., G94:10-20, G95:6-23; E81, ¶¶ 12-13 (recommended denials); E80, ¶¶ 10 and 14 and G96 (denials); I114, ¶¶ 5-6; K144 ¶ 6.

of 8 C.F.R. § 265.1 (1973), violated the terms of their nonimmigrant visas but have no proof other than nonexistant INS files, or received an unlawful change in status from the INS . . ." Id., p. 11. The district court also concluded the case was ripe for adjudication: "Given the expiration of the May 4th deadline, the INS's policies and regulations governing legalization applications are presumably final and therefore fit for judicial determination . . . Denial of judicial review would as a practical matter, completely foreclose any opportunity to present plaintiffs' claims." Id., p. 12 (emphasis added).

The district court also held that the plaintiff organizations possessed standing. Id., p. 13. The plaintiff organizations "counsel and assist aliens to obtain the benefits of legalization . . . , the INS's policies and administration of the amnesty program have perceptibly impaired these organizational goals as well as drained the plaintiff organizations' resources . . . [and the plaintiff] organizations fall within the zone of interests protected by IRCA." Id.; Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); Clarke v. Securities Industry Ass'n., __ U.S. __, 107 S.Ct. 750, 757 (1987) (footnote omitted).

By ruling as it did the district court avoided thousands of Category 1-3 applicants being forced to get themselves arrested, placed in deportation proceedings, suffer orders of deportation, file thousands of appeals to the BIA and finally thousands of petitions for review in the Courts of Appeals before obtaining a resolution regarding the legality of INS's national regulations. The plaintiffs in IAP did not seek a district court order reversing INS's denials of amnesty and ordering them eligible for amnesty. Instead, they challenged broad agency policies which automatically deemed them ineligible and, inter alia, resulted in erroneous denials of statutorily mandated temporary stays of deportation and employment authorization. As the district court stated after being fully advised of the claims made, "[d]enial of judicial review [by the district court] would as a practical matter, completely foreclose any opportunity" for judicial review of plaintiffs' claims." Id., p. 12.

7. Zambrano v. INS

In this class action lawsuit plaintiffs challenged INS regulations which automatically (and erroneously) deemed ineligible for legalization any applicant whose immediate family members had ever received

"public cash assistance."[38] As the district court later found, without INS appeal, the agency's regulations violated INA § 245A(d)(2)(B)(iii), 8 U.S.C. § 1255a(d)(2)(B)(iii). INS applied its illegal regulation during the 12-month application period. Thousands of eligible immigrants had their applications rejected under INS's Legalization Manual (Exhibit 8) or were discouraged from filing timely applications by INS's illegal regulation.

By memorandum opinion filed August 9, 1988 and an implementing order filed September 20, 1988, the district court entered a preliminary injunction restraining the INS from applying these illegal regulations to pending legalization applications. The court also required the INS to reprocess cases under the appropriate standard. INS did not appeal the merits of the district court orders, nor its provisional class certification. INS's appeal was limited to the jurisdiction of the district court and one portion of the court's implementing order requiring the INS to disclose the names of class members to class counsel. *Following entry of the district court's orders, INS amended the challenged regulations.*

The district court thereafter granted plaintiffs' motion for summary judgment. Order Granting Plaintiffs' Motions for Partial Summary Judgment, Permanent Injunction and Redefinition of Class (July 31, 1989). Aside from the jurisdictional argument, INS raised no opposition to the legal issue presented in plaintiffs' motion for partial summary judgment. While by this time INS had issued amended regulations, the district court held that the case was not moot, inter alia, because "the amendments do not address at all class two members who failed to timely apply in reliance on the challenged regulations." Id. at 7. The court concluded that the challenged regulations, "both facially, and as interpreted by the INS, are inconsistent with the statute." Id.

Part of the relief granted, and agreed to by the INS, involved reviewing thousands of cases in which INS had improperly required Zambrano class members to file unnecessary "waivers of excludability" and accompanying fees. Id. at 11. This type of relief--reimbursement of improperly obtained fees--could not effectively be raised in judicial proceedings to review "denials" of amnesty applications under INA §§

38 8 C.F.R. §§ 245a.1(i), 245a.2(d)(4) & 245a.2(k).

INA §§ 210(e) and 245A(f). In fact, the illegal fees were demanded whether or not the application was subsequently denied.

The district court also granted a five month extension (through December 31, 1989) of the application period for class members who "would have filed timely applications but for reliance on the invalid regulations." Id. at 15. These eligible applicants, like those in LULAC, CSS and Ayuda, could not appeal "denials" of their applications under INA §§ 210(e) and 245A(f), as they never received denials.

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CONCLUSION

As amici have shown, in several cases district courts have assumed jurisdiction under over challenges to illegal INS regulations which automatically deemed broad groups of eligible immigrants ineligible for amnesty. Neither the legislative history nor the language of the amnesty statute indicate that Congress intended to strip the federal courts of their federal question jurisdiction, 28 U.S.C. § 1331(a), or jurisdiction over "all cases arising under any of the provisions of this subchapter," 8 U.S.C. § 1329, in cases such as these involving broad statutory and Constitutional challenges to INS's rule-making.

It is supremely ironic that while INS argues before this Court that district court review of these cases would cause confusion, conflicting decisions and delays in resolution of broad policy questions, in truth and fact, in virtually every case, including the instant case before the Court, INS amended its challenged regulations and policies after district courts ordered it to do so, avoiding tens of thousands of administrative appeals which would have taken several years to resolve and allowing tens of thousands of eligible applicants to receive the stays of deportation and employment authorization mandated by Congress.[39] In every district court action, other than IAP, INS has now reprocessed or is now reprocessing applications under the proper standards.

Whatever may be argued in theory, there can be no doubt but that in practice the manner in which these cases were handled by the district courts--and the INS in response to court orders--is perfectly consistent with the efficient and expeditious manner in which Congress intended the amnesty program to function. *See* H. Rep. No. 99-682(I), 99th Cong., 2nd Sess., p. 49, reprinted in 1986 U.S. Code Cong. & Ad. News, p. 5653. Congress' primary purpose in enacting the judicial review provisions of IRCA was to avoid delays and uncertainty in the amnesty program. The Senate Report states:

> The Committee is concerned that efforts will be made, on behalf of many persons who are ineligible for the legalization program, to delay the final determinations of their applications. This would prevent not only their own deportation but the expeditious operation of the program . . .
>
> It is for the purpose of helping to insure reasonably prompt final determinations that subsection (f) [is enacted] . . .

S.Rep. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis supplied). District court review in these cases allowed for "expeditious operation of the program" and insured "reasonably prompt final determinations" in the case of all applications timely filed by persons who are eligible for the legalization program.

The primary case or controversy which remains at this time involves the fate of approximately 100,000 class members in Ayuda, CSS, LULAC and Zambrano who, at least, pursuant to federal court orders, are no longer part of the illegal, clandestine immigrant population Congress intended to eliminate through IRCA.

For the foregoing reasons, amici urge this Court to affirm the decision of the Eleventh Circuit in this case. In the event the Court reverses the judgments below, amici urge that it not do so in a manner which prejudges the appropriateness of district court jurisdiction under the facts of the amnesty cases addressed in this brief.

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39 Only in IAP and Ayuda has INS appealed portions of the merits of the district court orders.

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No. 89-1332

IN THE

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OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

—v.—

HAITIAN REFUGEE CENTER, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary national membership organization of the legal profession. Its over 360,000 members come from every state and territory and the District of Columbia. The ABA's constituency includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.

The ABA also has an historic interest in immigration policy issues and in the fair enforcement and implementation of our nation's immigration and refugee laws. Consistent with these principles and to help implement them, the ABA's policymaking House of Delegates created in 1983 the Coordinating Committee on Immigration Law. This committee, made up of representatives of nine ABA entities with specialized expertise (e.g., administrative law), has assisted in organizing numerous *pro bono* immigration representation efforts and trained volunteer attorneys from the private bar to counsel legalization applicants and represent them on appeal.

The ABA has an active and direct interest in the efficient and equitable administration of justice. The ABA appears as *amicus curiae* in the case because the question presented has serious implications for the allocation of the resources of the federal judiciary and access of parties to an effective forum for judicial review of administrative agency action. The ABA has received the consents of all parties to this case.

SUMMARY OF ARGUMENT

As part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, Congress required the Attorney General to grant residency under a Special Agricultural Worker ("SAW") program to alien farm workers who performed seasonal agricultural services and who otherwise qualified under the Immigration and Nationality Act, 8 U.S.C. § 1160 *et seq*. On this appeal the government erroneously contends that federal district courts are wholly precluded from asserting federal question or general immigration jurisdiction over matters arising under Title II of the Immigration and Nationality Act, 8 U.S.C. § 1329, by 8 U.S.C. § 1160(e) ("Section 1160(e)") where organizational as well as individual plaintiffs challenge the constitutionality of INS practices and policies that make meaningful individual review impossible.

The government's interpretation of Section 1160(e) would have the impermissible effect of precluding a forum for resolution of constitutional claims. The agency does not purport to adjudicate constitutional issues. Further, the statute and regulations circumscribing the administrative record that may be made and thus reviewed in the context of a SAW applications procedure and administrative appeal do not permit an applicant, as a practical matter, to make a factual record of alleged system-wide due process violations or of the factors to be considered in assessing the constitutionality of agency action. Clearly, a deficient record cannot be cured in a court of appeals. Thus, access to the factfinding forum of a district court is essential to the prosecution of broad-based "pattern and practice" regulatory challenges to the SAW process.

Moreover, the plain language and legislative history of the statute demonstrate that Section 1160(e) was intended to apply only to individual appeals of a "determination" on a SAW application and not to claims asserting system-wide defects in the process by which that determination was made. Single-tier judicial review provisions, of the kind the petitioners envisage, that vest jurisdiction in a court of appeals are traditionally viewed as a means of achieving efficiency by eliminating a layer of review in cases where the trial court would do little more than duplicate either the agency factfinding or the judicial appellate function. Below, as traditionally in pattern and practice cases, the role of a district court is not duplicative—it is essential for development of an adequate factual record.

The government's interpretation of Section 1160(e) would also have the effect of requiring SAW applicants to assert claims on a case-by-case basis that, insofar as they raise agency-wide practice and policy issues, would far more efficiently be dealt with as class actions. As argued under Point II, the government's own statistics demonstrate the burdens on the judiciary that would result unmitigated by any benefits to the parties and do not warrant judicial legislation to read into a statute that which is neither express nor intended.

ARGUMENT

POINT I

THE GOVERNMENT'S INTERPRETATION OF SECTION 1160(e) WOULD HAVE THE IMPERMISSIBLE EFFECT OF PRECLUDING REVIEW OF UNCONSTITUTIONAL AGENCY CONDUCT

It is entirely beyond the power of a SAW applicant to mount a broad-based challenge to regulatory procedures within the confines of Section 1160(e).[1] Administrative appel-

1 We respectfully refer the Court to the Petitioners' Appendix ("Pet. App."), the Response to the Petition for Certiorari, and the briefs of the parties for the full text of Section 1160(e) and other relevant statutory provisions, and for detailed statements of the background of this case.

We note briefly here that section 1160(e) relates to "administrative or judicial review of a determination respecting an application for adjustment of status under [the SAW program]." § 1160(e)(1).

The administrative procedure resulting in this "determination" commences with a personal interview at a legalization office ("LO"), a local office of the Immigration and Naturalization Service ("INS") authorized to accept and process applications. 8 C.F.R. § 210.1(i). The interviewing officer at the LO may deny the application, recommend that it be denied, or recommend that it be granted. Pet. App. 22a. Those applications that are not denied by the LO are forwarded to a regional processing facility ("RPF") for adjudication. *Id.*

The statute requires the Attorney General to "establish an appellate authority to provide a single level of administrative review of such a determination." § 1160(c)(2)(A). The appellate authority established under this section is the Legalization Appeals Unit ("LAU"). Pet. App. 22a.

Judicial review of a decision of the LAU is set forth in § 1160(e)(3)(A), which provides that "there shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105 of this title." Section 1105a provides in relevant part that "venue of any petition under this section shall be in the judicial circuit in which the administration proceedings . . . were conducted . . ." 8 U.S.C. § 1105a(a)(2). The circuit court's review is required to "be based solely upon the administrative record established at the time of the review by the appellate authority. . . ." § 1160(e)(3)(B).

late review is limited under the statute to "the administrative record established at the time of the determination on the application and . . . such additional or newly discovered evidence as may not have been available at the time of the determination." Section 1160(e)(2)(B). This "record" consists solely of a completed application form, a report of medical examination, any evidence by way of documents or affidavits of qualifying agricultural employment and residence, and notes, if any, taken on a Form I-696 worksheet by an interviewer at an LO at the time of an initial application—all relating in any given case to a single SAW applicant. *See* 8 C.F.R. §§ 210.1(c), 210.3(c)(3), 201.1(h); Pet. App. 4a, 28a.

The record established at the time of determination of an application is thus a wholly inadequate basis for review of system-wide practices and procedures like those alleged in this case.[2] That record does not begin to address the factors to be considered in assessing the constitutionality of agency procedures—the private interest at stake, the risk of erroneous deprivation and the probable value of additional safeguards, and the fiscal and administrative burdens that additional procedures would entail. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (*Mathews* test appropriate for evaluation of procedures in immigration context.) These factual determinations rest on evidence that is beyond the scope of an individual

2 It is not contested on this appeal that the INS systematically deprived thousands of SAW applicants of procedural safeguards designed to ensure a reasonable opportunity to obtain the benefits of the SAW program and to provide a record for review of any denial of these benefits. As is set forth more fully in Respondents' Brief, SAW applicants were subjected to an impermissible burden of proof; they were denied the opportunity to hear and rebut adverse evidence; they were denied translators necessary to adequate presentation of evidence; and they were deprived of an accurate record—in many cases, any record at all—of such evidence as they were able to present. *See* Respondents' Brief ("Resp. Br.") at 7-9.

SAW application and largely within the exclusive control of the government.[3]

A deficient factual record cannot be remedied in the court of appeals. *Congress & Empire Spring Co. v. Knowlton*, 103 U.S. 49 (1880); *Hefner v. New Orleans Pub. Serv., Inc.*, 605 F.2d 893 (5th Cir. 1979), *cert. denied*, 445 U.S. 955 (1980); 4A C.J.S. *Appeal and Error* § 1206 (1957). Even if a court of appeals were inclined to seek a means of supplementing the record before it, Section 1160(e)(3)(B) explicitly limits circuit court review to "the administrative record established at the time of review by the appellate authority. . . ." Expansion of Section 1160(e) to encompass all claims relating to SAW procedures, as the government urges on this appeal, would thus deprive SAW applicants of any forum for the factfinding essential to resolution of broad-based regulatory challenges.

Nothing in the language of the statute warrants a result so completely at odds with this Court's "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), a presumption that applies with particular force in the presence of "the 'serious constitutional question' that would arise if a federal statute were to deny

3 In the present case, for example, it was only in the district court that respondents were able to adduce sworn INS testimony revealing, among other things, that the INS does not investigate the proficiency of interpreters (Pet. App. 27a); that INS officers did not receive any training or instruction as to the shifting burden of proof to be employed in SAW cases and held erroneous views as to the standard required (Pet. App. 31a); and that the INS maintained lists of "suspect" affiants and relied on these lists to determine that an application was fraudulent without giving the applicant or the affiant any opportunity to rebut the "suspected" fraud (Pet. App. 32a-33a). Nor could a SAW applicant introduce into an administrative record regarding an individual application statistical evidence of the language capabilities of all SAW applicants (Pet. App. 26a); system-wide application of specific INS policies and practices (Pet. App. 9a, 28a, 32a-36a), or statistical evidence of relevant practices of farm labor contractors and other agricultural employees (Pet. App. 28a-29a).

any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988).[4]

To the contrary, the plain language of Section 1160(e) places the statute squarely within the class of jurisdiction-preclusion provisions that are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record—circumstances that are not present in "pattern and practice" cases where district court factfinding is essential. The statute on its face applies only to an individual applicant's appeal of a denial of SAW status and presumes the existence of a factual record from which an appellate tribunal can determine whether that denial was in error. Section 1160(e) speaks at all relevant points to "a *determination* restricting an application for adjustment of status," § 1160(e)(1); "review of *such a determination*," § 1160(e)(2)-(B); "the administrative record established at the time of *the determination*" § 1160(e)(2)(B); and "review of *such a denial*," § 1160(e)(3)(A) (emphasis added).

The United States Code is replete with similar provisions, all of which have in common the definition of a specific agency order based on a record that it would be wasteful to duplicate in a district court.[5] The traditional rationales for this kind of restriction on judicial review are conservation of

4 *See also Johnson v. Robison*, 415 U.S. 361, 367-73 (1974); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Oesterich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237-38 (1968); *Harmon v. Brucher*, 355 U.S. 579, 581-82 (1958); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955); *Estep v. United States*, 327 U.S. 114, 120-23 (1946); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334-37 (1932).

5 A partial illustrative list is provided in 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3941 (1977), which cites approximately 60 such provisions, ranging from orders of the Administrator of the Environmental Protection Agency with respect to the registration of poisons and pesticides, 7 U.S.C. §§ 135b(d), 136n(4), to actions of the United States Commissioner of Education in acting on state plans for community services program grants, 20 U.S.C. § 1008.

judicial resources and efficiency of administrative process. Vesting jurisdiction to review agency orders in the court of appeals under these statutes is simply a means of eliminating one layer of review in situations where a trial court would do little more than duplicate either the agency factfinding or judicial appellate function:

> [A]dministrative agencies, particularly in discharging quasi-judicial adjudicating functions, perform much the same functions with respect to the courts of appeals as do district courts. Evidence is heard, a record is prepared and sifted, issues are identified and resolved. Frequently, indeed, the issues are subject to the further testing of intra-agency review on appeal from an administrative law judge or hearing examiner, and resolution by a collegial body. The questions open for judicial review are commonly questions of law or review of the record for substantial evidence to support the administrative decision—matters as to which a district court would play the same role as a court of appeals. Review initially by a district court, and then by a court of appeals, would impose added burdens of delay on the administrative process, and of delay and expense on the parties.

16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3940, at 302 (1977).

The burdens imposed by two-tier judicial review of administrative determinations—as distinguished from two-tier review of challenges to the process by which such determinations are made—are described in *Polcover v. Secretary of the Treasury*, 477 F.2d 1223 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). There, district court review of a claim of wrongful discharge of a federal employee was limited to the record made by the Civil Service Commission, and the district court was required to apply the same standards of review as the court of appeals. The court of appeals criticized the

> [d]uplication, delay, expense and despair for the employee-litigant [that] are inherent in such a system.

> The interposition of the district court serves . . . no viable purpose [where] the record before us is identical to that [which had already been made at the administrative level and presented to] the district court.

477 F.2d at 1227.

Such would be the response were respondents here simply seeking to arrogate to the district court the narrow role ascribed to the court of appeals in Section 1160(e). At issue on this appeal, however, is an entirely different claim: that a district court has jurisdiction to entertain challenges to the process by which SAW determinations are made, a species of claim as to which no record could be made effectively in the absence of two-tier judicial review.

This Court has consistently recognized the distinction, for the purpose of jurisdiction preclusion, between appeals from a documented administrative decision and challenges to the process by which the determination is made. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986) (statute that limits review of "any determination . . . of . . . the amount of benefits . . . simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than *determinations* themselves"); *Christian v. New York State Dep't of Labor*, 414 U.S. 614, 622 (1974) ("the fact that the . . . agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedure used to reach that determination"); *see also Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977); *Fusari v. Steinberg*, 419 U.S. 379 (1975); *California Dep't of Human Resources v. Java*, 402 U.S. 121 (1971).

The rationale for single-tier judicial review is obviously irrelevant to the case where, as here, the very essence of claim sought to be heard in the district court is that the agency has precluded any meaningful review of its decisions. Thus, the two-tier judicial review of system-wide agency practices does not, as the government argues on this appeal, lead to a "peculiar division" of jurisdiction wherein the court of

appeals reviews "less important" issues than the district court.[6] A court of appeals, like the Eleventh Circuit below and the D.C. Circuit in *Ayuda*, would never have the opportunity to pass upon "broad questions . . . relating to a whole class of aliens" in the absence of a district court forum for development of the facts underlying those questions. More to the point, absent resolution of these "broad questions" by way of federal judicial trial and appeal, there cannot arise an "individual case" for the Court of Appeals to review as intended under Section 1160(e). As the Court of Appeals below correctly observed, "[w]ithout any record of what transpired at the interview . . . the review provided for in IRCA is meaningless. 'Meaningful review requires that the reviewing court should review'." Pet. App. 16a (quoting *Kent v. United States*, 383 U.S. 541, 561 (1966)).

POINT II

DIVESTING DISTRICT COURTS OF FEDERAL QUESTION JURISDICTION OVER "PATTERN AND PRACTICE" CLAIMS DEPRIVES THE PARTIES AND THE JUDICIARY OF THE EFFICIENCIES OF CLASS ACTION LITIGATION

The government's interpretation of Section 1160(e) would preclude SAW applicants from proceeding as a class under Fed. R. Civ. P. 23 ("Rule 23"). The government's position would thus require all SAW applicants who may allege injury from system-wide agency abuses to seek relief on a case-by-case basis and an incurably defective record in the federal

6 *See* Petitioners' Brief ("Pet. Br.") at 14: "In this case, permitting review of an alleged pattern and practice of INS conduct in district court would lead to a 'rather peculiar' division of jurisdiction, because the court of appeals, in reviewing deportation orders, would hear 'only the application of the statute in presumably less important individual cases' while district courts would review 'the much more important cases involving broad questions . . . that would apply to a whole class of aliens' " (quoting *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1331-32 (D.C. Cir. 1989)).

appellate courts in the context of individual deportation orders. A sense of the overwhelming burden this would impose on the parties and courts is provided by the INS' own statistics.

According to INS statistics, half of the nearly 1.3 million SAW applications on file were still pending as of May 16, 1990. Statistics Division, Office of Plans and Analysis, U.S. Immigration and Naturalization Service, *Provisional Legalization Application Statistics*, Table 1, May 16, 1990. Of the approximately 50,000 applicants whose petitions had been denied as of that date, *id.*, "about fifteen percent . . . have filed appeals with the LAU." 2 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 47.02(8)(c), at 47-36 (rev. ed. 1990) (citing telephone interview with Michael Jaromin, INS Legalization Office (Oct. 12, 1989)). According to the government's Petition for a Writ of Certiorari in this case, "nearly 30 . . . cases have been filed across the country to challenge INS rules and policies under the legalization programs." Cert. Pet. at 28.

INS statistics show that during the period 1982 through 1988, federal circuit courts managed to review an average of 387 orders of deportation per year, leaving an average of 830 cases pending at each year-end. *1988 Statistical Yearbook of the Immigration and Naturalization Service* 135. The actual number of cases reviewed decreased each year (with the exception of 1984) from 533 in 1982 to 208 in 1988. *Id.* In 1982, the courts were able to dispose of approximately the same number of cases as those left pending. *Id.* In 1988, courts reviewed approximately a quarter of the number of cases left pending. *Id.* If, consistent with statistics for SAW applications already closed, 50,000 of the remaining applications are denied, appeals to the circuit courts of only one percent of those denials would flood the courts with twice the number of all cases that were decided over the seven year period of 1982-1988.

The inefficiencies inherent in this prospect are not mitigated by any benefit to the parties. To the contrary, the fail-

ure of SAW applicants to obtain relief on a case-by-case basis is in striking contrast to the success achieved in class actions. "The LAU remanded about ninety percent of the appeals it received in 1989, mostly because of court orders [in district court class actions] requiring the INS to correct deficiencies in adjudicating SAW applications." 2 C. Gordon & S. Mailman, *supra*, at 47-36 & n. 267 (citing *Haitian Refugee Center, Inc., v. Nelson*, 694 F. Supp. 864 (S.D. Fla. 1988), *aff'd*, 872 F.2d 1555 (11th Cir. 1989); *United Farmworkers of America (AFL-CIO) v. INS*, Civ. No. 5-87-1064-LCK/JFM (E.D. Cal. Apr. 3, 1989) (Settlement Agreement), *reported in* 66 Interpreter Releases 452, 467-68 (Apr. 24, 1989)). In contrast, the decisions of the LAU reveal that prior to the initiation of this suit not one individual determination was reversed on grounds of procedural irregularities. *See* Response to Petition for Certiorari at 11 n.5. Moreover, our review of circuit court opinions available on LEXIS does not reveal a single instance to date in which a SAW applicant obtained circuit court review of INS policies or procedures through an individual appeal under Section 1160(e).

The due process claims that the government would relegate under Section 1160(e) to case-by-case review are directly analogous claims asserted in *Califano v. Yamasaki*, 442 U.S. 682 (1979). There, this Court rejected government objections to certification of a class of plaintiffs challenging certain procedures under the Social Security Act as violative of due process. In *Yamasaki*, as in the present case,

> [t]he issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class . . . . It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting many [applicants] to be litigated in an economical fashion . . . .

442 U.S. at 701.

As set forth in *Yamasaki*, this Court requires "a clear expression of Congressional intent" to "indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action is otherwise permissible.". *Id.* at 700. The legislative history of IRCA reveals no such intent. To the contrary, in enacting the bill that codifies Section 1160(e), Congress rejected a version containing a judicial review provision that explicitly barred class actions.[7] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1218-19 (1987). The legislative history reflects, moreover, that Congress sought to "ensure that fair administrative reviews are conducted by the INS and to provide for the complete consideration of all possible evidence to determine legalization" without "unduly burden[ing] to Government or the applicants with an excessively complex process," 130 Cong. Rec. 17229 (daily ed. June 20, 1984) (Remarks of Rep. Mineta). These concerns are consonant with the policies embodied in Rule 23 and embraced by this Court—and with the realities of how issues are raised and preserved in "pattern and practice" cases.

The most frequently recognized benefit of the class action is avoidance of duplicative suits and the concomitant increased court efficiency in the administration of litigation. The Rules Advisory Committee in commenting on the 1966

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7 The bill in question, S. 1200, did not yet contain a SAW program. S. 1200 would have established a general legalization program under which there would be "no judicial review (by class action or otherwise) of a decision or determination under this section" and further provided that an alien denied adjustment of status under this legalization program "may not raise a claim concerning such adjustment in any proceedings of the United States or any State involving the status of such alien. . . ." S. 1200, 99th Cong., 2d Sess. § 202(f)(1985). H.R. 3810 did provide for a SAW program and as passed by the House contained what is now 8 U.S.C. § 1160(e). The Conference substitute adopted the House provision including the provisions with respect to judicial review. See H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 96 (1986).

amendments to Fed. R. Civ. P. 23 stresses the judicial economies and procedural convenience of class actions: "[the Rule] encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966).

This Court, as well, has recognized that class certification advances "the efficiency and economy of litigation which is a principal purpose of the procedure." *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 (1982). *See also American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974) ("A federal class action is . . . a truly representative suit designed to avoid, rather than encourage, unnecessary filings of repetitious papers and motions.")

Class actions provide significant benefits to defendants as well as plaintiffs:

> The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, [and] the provision of a convenient and economical means for dispensing of similar lawsuits . . . .

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980); *see also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980); Note, *Developments in the Law, Class Actions*, 89 Harv. L. Rev. 1318 (1976).

Commentators also recognize the particular utility of the class action procedure in civil rights litigation:

> Groups which find themselves unable to achieve their stated objectives through the ballot frequently turn to the Courts . . . . [They help make] possible the distinctive contribution of a minority group to the ideas and beliefs of our society [and provide an] avenue open to a minority to petition for the redress of grievances.

NAACP v. Button, 371 U.S. 415, 429-30 (1963). Judge Weinstein has observed that "[t]he impact of class actions in civil rights cases is substantial. Precedent alone never has the affect of a judgment naming a particular class of which a person is a member." Weinstein, *Some Reflections on the 'Abusiveness' of Class Actions*, 58 F.R.D. 299 (1973) (remarks before the Fifth Judicial Circuit Symposium on Class Actions).

Judge Weinstein's remarks are particularly apt in the context of the SAW program. We have not found a single individual SAW application that has reached the Court of Appeals, although all interviews under the program (other than re-interviews ordered as a result of the outcome of class actions filed in district courts) apparently have been completed. Assuming, for the sake of argument, that an individual applicant were able to obtain meaningful relief in the court of appeals by means of the review set forth in Section 1160(e), at this juncture a decision invalidating defective INS procedures would have no prospective effect. Each applicant affected by those procedures would be required to seek a separate order re-opening his or her application.

It is also significent that, as of May 16, 1990, only 3.3 percent of all SAW applicants were represented by counsel, while 75 percent proceeded *pro se*. The remaining 21.7 percent were not represented by legal counsel, *pro bono* or otherwise, but by temporary agencies created by voluntary groups called Qualified Designated Entities. Letter of Michael Hoefer, Chief of the Demographic Statistics Branch, Statistics Division of the INS, to Kristine Poplowski dated August 14, 1990 (Annexed hereto as Appendix A). Another benefit of the class action that is clearly relevant here is "effective utilization of finite sources of legal help." 1 H. Newberg, *Newberg on Class Actions*, § 5.13, at 451.

An interpretation of Section 1160(e) that divests district courts of jurisdiction to hear broad-based regulatory challenges thus unnecessarily burdens all concerned—plaintiffs, the government, the judiciary, and scarce *pro bono* counsel—

by withholding the clear benefits of class certification that is otherwise appropriate under Rule 23.

CONCLUSION

For the foregoing reasons, *amicus* American Bar Association urges that the decision of the Court of Appeals for the Eleventh Circuit be affirmed.

Respectfully submitted,

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APPENDIX

A 1

[LETTERHEAD
U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE]

CO-979-C

August 14, 1990

Christine Poplowski
Farm Worker Justice Fund
2001 S St. NW
Suite 210
Washington, D.C. 20009

Dear Ms. Poplowski:

This is in response to your telephone conversation requesting the number of Special Agricultural Worker (SAW) applicants who used the services of a lawyer.

As of May 16, 1990, SAW applicants were represented by: self - 957,720 (75.0 percent); Lawyer only - 38,637 (3.0 percent); Qualified Designated Entity (QDE) only - 277,063 (21.7 percent); Lawyer and QDE - 3,324 (.3 percent). The total represented by lawyers is 41,961 or 3.3 percent.

If I can be of further assistance or if you have any questions please contact me at (202) 376-3066.

Sincerely,

/s/ MICHAEL D. HOEFER

Michael D. Hoefer, Chief
Demographic Statistics Branch
Statistics Division

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CLERK

No. 89-1332

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

GENE MCNARY, Commissioner of Immigration And Naturalization, et al.,
Petitioners,
vs.
HAITIAN REFUGEE CENTER, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

State of California; City of Los Angeles, California; Los Angeles Unified School District; Dade County, Florida; City of Miami, Florida

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INTEREST OF AMICI

The State of California, the Metropolitan Dade County, Florida, the City of Miami, Florida, the City of Los Angeles, California, and the Los Angeles Unified School District, California, present this brief as Amici Curiae in support of Respondents, and respectfully request the Court to affirm the decision of the Court of Appeals for the Eleventh Circuit. That court correctly held that the district court had jurisdiction under 28 U.S.C. section 1331(a) to consider plaintiffs' challenge to unconstitutional patterns and practices employed by the Immigration and Naturalization Service ("INS") in its administration of the Special Agricultural Worker ("SAW") Program created by the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 7, 8, 26, 42 and 50 U.S.C.).

Congress created the SAW Program to grant residency to immigrant farmworkers who had performed seasonal agricultural services and who were otherwise admissible as immigrants. 8 U.S.C.S. § 1160 *et seq.* (Law. Co-op. 1987 & Supp. 1990).[1] An estimated 1.3 million SAW applications were filed nationally. United States General Accounting Office Report to Agency Officials, *Immigration Reform: Potential Impact on West Coast Farm Labor* 12 (Aug. 1989) [hereinafter, "GAO Report to Agency Officials"]. The majority of all SAW applicants — about 700,000 — reside in California. *The*

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[1]IRCA also provided for the "legalization" of undocumented aliens who had been continuously and unlawfully resident in the United States since a date prior to January 1, 1982. IRCA § 245A, 8 U.S.C.S. § 1255a (Law. Co-op. 1987 & Supp. 1990). This legalization program is referred to herein as the Section 245A Program.

President's Comprehensive Triennial Report on Immigration 17 (1989) [hereinafter, "President's Triennial Report"]; F. Bean, G. Vernez & C. Keely, *Opening and Closing the Doors: Evaluating Immigration Reform and Control* 68 (Rand Corp. & The Urban Institute 1989) [hereinafter, "Bean, Vernez & Keely"]. California is home to the majority of applicants for residence under both IRCA legalization programs, as shown in the following table of the five states with the largest share of legalization applicants:

State	Share of SAW Applicants	Share of All Legalization Applicants
California	55%	56%
Texas	8%	18%
New York	3%	7%
Illinois	less than 3%	7%
Florida	11%	3%

President's Triennial Report at 17-18.

Many Section 245A Program and SAW applications were filed in urban areas, with New York City and Los Angeles-Long Beach receiving the most applications. *Id.* The Miami-Hialeah area received 7.4 percent of the SAW applications filed, while Los Angeles-Long Beach was second with 5.1 percent. *Id.*

Prior to the enactment of IRCA, hundreds of thousands of undocumented aliens made their homes within the jurisdictions of the amici. These residents, within the legal and social limitations placed upon them, lived, worked, paid taxes, raised families, and generally formed a significant part of the temporary and permanent populations within the care of each amicus. With the passage of IRCA, the status of each and every undocumented person changed. Some, who are being "legalized," have been brought "out of the shadows" and into the light of the full protection of federal, state and local laws. Others, who have been found ineligible for legalization or have failed to apply, have been pushed further into the shadows, as IRCA limits their access to employment, public assistance and many government services.

The amici are faced with the task of integrating into local societies and economies both those newly legalized by IRCA and those further disadvantaged by it. This task presents tremendous opportunities for enabling newly legalized residents to participate fully in United States society for the first time. It also imposes tremendous costs, both of administration and of coping with the dislocation and disruption of the still-undocumented population in the post-IRCA era. The amici, therefore, have a strong interest in insuring that unconstitutional patterns and practices of the INS do not defeat IRCA's purpose of bringing all "documentable" residents into the light.

SUMMARY OF ARGUMENT

Adopting the INS's interpretation of federal question jurisdiction would have the effect of permitting the INS systematically to deny whole classes of SAW applicants the legal status Congress intended them to have, trapping these documentable workers permanently in the shadows, without any effective judicial review of the patterns and practices leading to wholesale denial of the constitutional rights of these applicants. The amici thus have a direct and substantial interest in the outcome of this case, in that reversal of the decision of the court of appeals would ultimately impose greater costs, both

economic and social, on the amici responsible for governing and protecting these disadvantaged, documentable residents.

The intent of Congress in creating the SAW Program was to legalize quickly the pre-existing large seasonal agricultural workforce in this country and to afford to these persons the full protections of federal, state and local laws. If district courts cannot review patterns and practices in INS's administration of the SAW Program, there will be no way to correct unconstitutional procedures resulting in the improper denial of large numbers of applications. As a result, countless eligible workers will be trapped, perhaps permanently, in the "shadow population" of undocumented workers Congress intended to eliminate.

Adding eligible SAW applicants to the population of undocumented persons imposes social and economic costs on state and local governments. SAW applicants generally live on the margin of economic self-sufficiency. IRCA made illegal the hiring or harboring of undocumented workers, including "documentable" workers whose legalization applications have been denied improperly, and enforcement of IRCA's employer sanctions provisions has eliminated or greatly reduced the availability of any employment for these workers. These workers therefore are cast improperly among those subject to still greater exploitation than existed prior to IRCA's enactment. Fear of deportation prevents them, along with other undocumented persons, from calling on public agencies for assistance in dealing with exploitation in employment. This same fear prevents them, along with other undocumented persons, from cooperating with local law enforcement efforts and from seeking needed health care and social services. State and local governments are charged with protecting the health and welfare

of all residents. Improperly relegating eligible SAW applicants to a fearful, exploited underclass, afraid to report abuse and unwilling to seek help, makes this already difficult task nearly impossible.

State and local governments also lose funding when eligible workers are trapped in the shadows. IRCA creates short-term funding, the "State Legalization Impact Assistance Grants" ("SLIAG"), to be used to reimburse state and local governments and other participating agencies a portion of the substantial costs of the legalization programs. Wrongful denial of SAW applications reduces the amount of reimbursement to states in which the SAWs reside, and delay in correcting the patterns and practices leading to the denials may delay legalization of these persons until after the SLIAG funding has run out.

Another way state and local governments lose money when eligible workers are left undocumented is that such persons tend to be missed in the decennial census, on which depends funding under numerous federal assistance programs, as well as representation in Congress. In addition, governments at all levels lose tax revenues when eligible workers are denied legal status and legal employment and must seek jobs in the "underground economy," where wages are low and money is paid under the table.

IRCA not only undermines the economic condition of workers wrongfully denied SAW status, but also cuts off the availability of federal assistance to them. State and local governments must shoulder the increasing costs of providing these residents a "safety net" of assistance.

In some state and local governments have a direct interest in the proper administration of the IRCA legalization programs, and will be injured if the review theory proposed by the INS is adopted, not only because

the social and economic costs of unconstitutional denials of legalization applications will fall upon them, but because state and local governments, like the organizational Respondents herein, will be denied a forum in which to protect their own interests.

ARGUMENT

I

THE INS'S JURISDICTIONAL THEORY WOULD DENY STATE AND LOCAL GOVERNMENTS, AS WELL AS DOCUMENTABLE WORKERS, ANY FORUM FOR PROTECTING THEIR INTERESTS IN THE PROPER ADMINISTRATION OF THE SAW PROGRAM

A. District Court Jurisdiction Provides State and Local Governments Their Only Forum for Raising Relevant Issues Concerning The INS's Improper Practices

Petitioners argue that not only classes of individual SAW applicants, but also the organizational Respondents, the Haitian Refugee Center ("HRC") and Migration and Refugee Services ("MRS"), are precluded by section 1160(e) from raising constitutional challenges to the patterns and practices of the INS in administering the SAW program. Brief for Petitioner at 23-26. As amply demonstrated in the Brief for Respondents at 41-48, neither the language of IRCA nor its legislative history indicates any intention on the part of Congress to preclude judicial review of INS practices at the behest of these organizations.

It is important to state and local governments that the ruling of the court of appeals rejecting the INS's argument as to the organizational Respondents be affirmed. State and local governments have even greater interests in the proper administration of the SAW

program than the organizational Respondents herein. To a greater extent than Qualified Designated Entities like MRS, state and local governments are charged by IRCA with responsibility to administer the legalization programs and provide the services needed by legalizing residents. State and local governments suffer economic and social injury when applicants are systematically denied lawful status due to constitutional abuses in the application process. Moreover, state and local governments lose SLIAG allocations when applications of their residents are improperly denied, as well as general federal funding when documentable persons are erroneously forced back into the "shadow population" overlooked in the census.

State and local governments, as well as other parties with standing, must be permitted to seek redress for these and other injuries arising from the INS's administration of IRCA. *Cf. Perales v. Meese*, 685 F. Supp. 52 (S.D.N.Y.), *aff'd*, 847 F.2d 55 (2d Cir. 1988) (class action challenge to INS definition of "public charge" exclusion under IRCA § 201, 8 U.S.C.S. § 1255a(d)(2)(B)(ii) brought by Commissioner of New York State Department of Social Services); *City of New York v. Meese*, No. 88-Civ. 1570 (S.D.N.Y. 1988) (class action challenging related public assistance definition, suspended after INS issued a memorandum changing a related public assistance definition). Adoption of INS's unsupported reading of section 1160(e) to bar completely all constitutional challenges to its practices in connection with the SAW program except through the wholly inadequate vehicle of individuals' appeals of final orders of deportation, would severely restrict state and local governments' ability to protect their own interests and those of their populations.

B. The INS's Review Theory Permanently Traps Documentable Workers in the Shadow Population and Denies Them Judicial Review

The district court found that the INS systematically employed unconstitutional practices in handling SAW applications, denying applicants the ability to present and defend their applications, and resulting in potentially large numbers of documentable workers being denied legalization. Conceding here the validity of that finding, the INS nevertheless argues that no court can review and correct these practices until an individual applicant has been denied SAW status, has subsequently been apprehended by the INS, has been placed in deportation proceedings and ordered deported, and has appealed the order unsuccessfully to the Board of Immigration Appeals. Brief for Petitioner at 9, 11. The INS's position is that only then, in the context of an individualized appeal of a final order of deportation to the court of appeals, can the constitutional challenges to the patterns and practices that led to the initial denial of the SAW application be raised.[2]

The INS's review theory is even more implausible than appears upon its face: in fact, it is unlikely that any particular applicant denied SAW status will *ever* be placed in deportation proceedings. There is more than adequate support for the concern that denied applicants are trapped permanently in the shadow population of undocumented persons. The population of undocumented persons in the United States, even after legalization, is estimated to be between two and four million, *see*

[2]Indeed, given the abuses alleged in this case, the court of appeals could do little for the individual but remand the case to the Legalization Office with instructions to create a reviewable record and start the process again.

G. Borjas, *Friends or Strangers: The Impact of Immigrants on the U.S. Economy* 65 (1990) [hereinafter, "*Friends or Strangers*"] (3 to 4 million); President's Triennial Report at 29 (1.8 to 3.1 million), while the number of deportable persons apprehended by INS investigation units in 1988 was only 37,000. Bean, Vernez & Keely at 38, Table 4.2.[3]

Moreover, in enacting IRCA, Congress recognized the impossibility of deporting the huge numbers of undocumented persons already residing in the United States, and determined to concentrate its apprehension on new flows of immigrants, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, 49, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5653. IRCA itself prohibits the use of any information about undocumented persons obtained in the legalization process in any enforcement proceeding. 8 U.S.C.S. § 1255a(c)(3)-(5). INS enforcement activities have changed accordingly. Even undocumented workers caught in employer investigations are not necessarily placed in deportation proceedings. One senior District official in Chicago reported that aliens found in the workplace were neither apprehended nor removed — the employer was simply expected to fire them before the next inspection. M. Fix & P. Hill, *Enforcing Employer Sanctions: Challenges and Strategies* 104 (Rand Corp. & The Urban Institute 1990) [hereinafter, "Fix & Hill"]. As a practical matter, many deportable aliens are offered, and accept, voluntary departure

[3]It should be noted that this figure does not reflect the significant number of individuals apprehended at the borders. Bean, Vernez & Keely at 38, Table 4.2. (Table separately lists number of apprehensions made by INS's Border Patrol and Investigations units). For purposes of the instant case, however, border statistics are not relevant in that they reflect persons who have not yet settled in this country.

when apprehended and are not placed in deportation proceedings at all. *See id.*

Even if a denied applicant is later apprehended by the INS, the decision whether to begin deportation proceedings and, perhaps, trigger eventual judicial review of its own patterns and practices, lies with the INS itself. Congress could not have intended that, by choosing not to initiate deportation proceedings against individuals alleging widespread unconstitutional practices, the INS itself could preclude any judicial review of those practices.

Thus, very few, if any, documentable workers denied legalization due to unconstitutional patterns or practices of the INS will ever be able to challenge these practices, obtain relief, and bring themselves within the full protection of "all applicable federal, state and local laws." Even if the INS happens to issue a final order of deportation triggering review and, ultimately, correction of its constitutional abuses, such an appellate opinion will little benefit the hundreds of thousands of applicants who will have been adjudicated in the interim under the faulty procedures.

For all practical purposes, documentable workers trapped in the "shadow population" as the result of systematic constitutional violations by the INS have no way out unless INS practices and procedures can be challenged in district court so that fair procedures can be mandated for all applicants. The perpetuation of this shadow population by means of the very programs meant to eliminate it imposes huge social and economic costs on state and local governments.

II

THE ABILITY OF DISTRICT COURTS TO CORRECT PATTERNS OF SYSTEMATIC CONSTITUTIONAL ABUSES BY THE INS FURTHERS THE INTENT OF CONGRESS TO LEGALIZE FARMWORKERS AND AFFORD THEM THE PROTECTION OF LAW AS QUICKLY AS POSSIBLE

The intent of Congress in enacting the SAW Program was to address the concerns of agricultural employers, who feared that the effect of IRCA's employer sanctions would be to remove large numbers of undocumented laborers from the agricultural work force, by creating an agricultural workforce protected "to the fullest extent of all applicable federal, state and local laws." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, 83-84, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5687-88. In creating the SAW Program, "the [House] Committee [on the Judiciary] was ever mindful of the reports of abuses that occurred during the old Bracero program (P.L. 82-72) and had no intention of creating an environment conducive to the violation of worker rights." *Id.* at 5687. In order to serve the needs of both the growers and the agricultural work force, Congress streamlined the legalization requirements for seasonal agricultural workers, requiring a briefer residence in the United States, a lesser burden of documentation of eligibility and fewer restrictions on access to public services than were imposed on applicants under the Section 245A Program.

In arguing that IRCA precludes judicial review of systematic constitutional abuses in the INS's implementation of the SAW Program, Petitioners ride roughshod over Congress's intent in creating the SAW Program. The INS does not contest the finding that its practices were improper. The substance of the INS's argument is

that it may deny "documentable" workers the legalized status due them, then delay or prevent altogether review of the unconstitutional patterns and practices consigning these workers to the underground economy. Adoption of the INS's position would wreak untold injury on individual documentable workers; it would also impose tremendous losses and burdens on state and local governments.

III

TRAPPING DOCUMENTABLE WORKERS IN THE SHADOW POPULATION IMPAIRS THE ABILITY OF STATE AND LOCAL GOVERNMENTS TO PROTECT THE WELFARE OF ALL PERSONS RESIDING IN THEIR JURISDICTIONS, REGARDLESS OF LEGAL STATUS

The rejection of general federal jurisdiction in the district courts to correct patterns of unconstitutional practices would unreasonably—and in contravention of one of IRCA's principal purposes—delay the elimination of the vulnerable status of entire categories of previously undocumented persons whom Congress identified for legalization. These documentable individuals now find themselves improperly included in a shadow population of undocumented aliens who cannot or will not leave the country and who have been forced to labor in the underground economy without the benefits or protections of the law. SAW applicants, already among the poorest and most exploitable of workers, face dire consequences from denial of legal status.

More than half of all SAW applicants filed their applications in California. GAO Report to Agency Officials at 12. Surveys of these applicants reveal that SAWs are the poorest of the working poor. The median

annual income for rural SAW *families* was only $7,000 to $9,000. E. Kissam & J. Intili, *Legalized Farmworkers and Their Families: Program and Policy Implications* 22-23 (1989) [hereinafter, "Kissam & Intili"] (surveying SAW applicants in six rural California counties). Only families with more than two working wage earners were at all likely to be found above the poverty level. *Id.* SAW applicants who did not receive housing from their employers spent from one-third to nearly one-half of their total income on housing. *Id.* at 24.

Less than one-third of SAWs surveyed had any kind of health insurance. Comprehensive Adult Student Assessment System, *A Survey of Newly Legalized Persons in California* at 6-15 to 6-19 (1989). Over eighty percent of both SAW and Section 245A Program applicants were found to be illiterate or to lack minimal English language skills. *Id.* at 4-2. The average SAW applicant had less than six years of education. Kissam & Intili at ii-iii; J. Simon, *The Economic Consequences of Immigration* 289 (1989) [hereinafter, "Simon"] (the undocumented have on average less education and skills than the legal immigrant and native labor force).

Plainly, SAW applicants generally are a highly vulnerable population. When large numbers of SAW applicants are denied, without recourse, the legal status Congress intended them to have they lose both the protections of the laws and, perhaps, their already tenuous grip on economic self-sufficiency. State and local governments, meanwhile, must perform the difficult feat of protecting those individuals (and the rest of society) by enforcing criminal, employment and anti-discrimination laws and by reducing the incidence of homelessness and attrition from schools. This seemingly impossible task requires outreach to a people who are now more suspi-

cious of government agencies than ever before, and are afraid to assert what rights they may have.

A. IRCA's Employer Sanctions Undermine The Ability of Documentable Workers to Survive Without Government Assistance

Before November 6, 1986, employing undocumented workers did not violate federal law.[4] *See* Fix & Hill at 23-24. In enacting IRCA, Congress determined to discourage future illegal immigration by making it unlawful to hire "unauthorized aliens" as defined in the Act. 8 U.S.C.S. § 1324a(a) (Law. Co-op. 1987 & Supp. 1990). Cease and desist orders, civil money penalties, injunctions and criminal penalties, including imprisonment, are provided for employers engaging in a "pattern or practice" of knowingly hiring unauthorized aliens, 8 U.S.C.S. § 1324a(e)-(f), or harboring, shielding or concealing unauthorized aliens. 8 U.S.C.S. § 1324(a).[5]

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[4]Prior to IRCA, California, Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, Vermont, and Virginia had laws outlawing employment of undocumented workers. However, unlike IRCA, studies indicate that these laws were not aggressively enforced. Bean, Vernez & Keely at 47-48.

[5]Full enforcement of IRCA's employer sanctions provisions began May 31, 1988 for most employers, and December 1, 1988 for employers of seasonal agricultural workers. 8 U.S.C.S. § 1324a(i). Unauthorized aliens employed on the date of enactment of IRCA could remain employed in the same job without risking imposition of sanctions on their employers, but could not legally be hired for new jobs. Pub. L. 99-603 § 101(a)(2), 100 Stat. 3360, codified at 8 U.S.C.S. § 1324a (note). For a report on the effectiveness of employer sanctions, see United States General Accounting Office, *Report to the Congress, Immigration Reform: Employer Sanctions and the Question of Discrimination* (Mar. 1990). In Los Angeles, the INS District Investigations staff grew from 35 in 1985 to 152 in 1989; (continued...)

Otherwise documentable residents who have been denied SAW status improperly by reason of unconstitutional INS procedures are relegated to the class of "unauthorized aliens" despite Congressional intent to the contrary.

The GAO in its 1990 Report to Congress stated that "[n]early all evidence suggests that IRCA has reduced illegal . . . employment." United States General Accounting Office, *Report to Congress, Immigration Reform: Employer Sanctions and the Question of Discrimination* (Mar. 1990) at 102. Of 864 unauthorized aliens apprehended at work during August and September, 1989, 135 reported that they had been refused employment elsewhere because they could not document their authorization to work, and 80 of these stated they had been denied employment for this reason on more than one occasion. *Id.* at 103. The number of arrests of illegally employed aliens, adjusted for level of enforcement (that is, per investigator hour), has declined 59% since IRCA's passage. *Id.* at 107. Arrests of visa violators, typically persons who were admitted to the United States as visitors who have been caught working illegally, are down 21% from the 6-month period ending September, 1986. *Id.* at 108-09. These trends indicate that IRCA's employer sanctions provisions are, in fact, reducing employment opportunities for undocumented workers in the general labor market (including those

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[5](...continued)
46% of this staff is devoted to enforcement of employer sanctions. Fix & Hill at 89. Officials at the Los Angeles District Office report enforcement of employer sanctions as their top priority. *Id.* at 95. In the Chicago District Office, INS investigations staff grew from 47 to 86 in the same period; 35 of the 86 investigators (41%) enforce employer sanctions. *Id.* at 89-90. Enforcement of sanctions is reported to be the first priority of the Chicago office. *Id.* at 95.

improperly denied work authorization), and driving them into the underground economy.

Even before the enactment of IRCA, when employment of undocumented workers was legal, such workers were subject to abuse and exploitation which pushed these workers further from economic self-sufficiency and, therefore, closer to reliance on public assistance for survival. Representative Rodino described the plight of the undocumented worker: "[U]ndocumented persons must keep all contacts with governmental authorities to an absolute minimum . . . . When their employer short changes them or doesn't pay them for overtime, or pays them less than minimum wage, they will complain to no one." 132 Cong. Rec. H9709 (daily ed. Oct. 9, 1986) (statement of Rep. Rodino).[6]

It is too soon to measure the effect of IRCA on employment abuses, but most observers believe exploitation of undocumented workers (including those improperly denied legalization) will only increase, and anecdotal evidence already suggests this is the case. *See, e.g.*, Hispanic Development Council of United Way & Orange

[6]Congress heard substantial evidence of such pre-IRCA exploitation. *See, e.g., Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 64 (1985) (testimony of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO), 76 (statement of Archbishop (then Bishop) Anthony J. Bevilacqua), 93 (statement of Dale De Haan, Director, Church of World Service); H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 47 *reprinted in* 19[illegible] U.S. Code Cong. & Admin. News 5651 (testimony to the Immigration Subcommittee on September 9, 1985 by Althea Simmons, Director, Washington Bureau, NAACP) ("The worker is consciously aware that he/she has no protection because of illegal status and will accept 'starvation' wages to be employed in the United States.").

County Human Relations Commission, *Impact of Immigration Reform and Control Act: The Orange County Experience* 29 (July 1989) [hereinafter "Orange County Report"] (testimony of Robert Balgenorth, Executive Secretary Building & Construction Trade Council, AFL-CIO, noting that "[t]he undocumented will be more vulnerable then ever. The contractor who hires the undocumented workers knows that the worker has nowhere to turn if the contractor does not pay the agreed upon wage"); *id.* at 7 (noting that undocumented workers constitute most of the "day laborers," those who seek daily employment on city street corners, and suffer some of the most abusive labor practices); *id.* at 22 (testimony of Linda Wong, Executive Director of California Tomorrow, noting an increase in minimum wage, health and safety violations against people who remained undocumented after IRCA).[7] By limiting the undocumented workers' employment opportunities to those employers willing to hire them in violation of the law, IRCA has increased the likelihood that these workers will be exploited with low wages, poor working conditions and other abuses.[8]

[7]*See also* Tobar, *Immigration Reform Backfires: No Rights for Migrant Workers*, The Nation, Sept. 19, 1988, at 196 (IRCA, by producing a desperate class of workers willing to accept increasingly substandard wages and working conditions, has created new incentives for employers to hire undocumented workers); Corchado & Solis, *Immigration Law Creates a Subclass of Illegals Bound to Their Bosses and Vulnerable to Abuses*, Wall St. J., Sept. 2, 1987, at 44, col. 1 (immigrants present in United States at the time of IRCA's passage who do not qualify for legalization face depressed wages and substandard working conditions).

[8]Brown, *Economic Serfdom*, 32 Boston Bar J., Mar./Apr. 1988, at 14 ("There are reliable reports that many forms of enslavement

(continued...)

If the INS is permitted to systematically deny SAW applications proper consideration, without any effective judicial review and correction of unconstitutional patterns and practices, the documentable workers will be consigned to the "underground economy" of employers willing to hire them in violation of the law and will suffer the increased abuses characteristic of this sort of employment. Not only the undocumented, but also society at large suffers when these abuses are permitted to continue.

B. Persons Wrongly Denied Legalization Neither Assist State and Local Governments Nor Seek Needed Assistance For Themselves Due to Fear of Deportation

One of the reasons employment abuses — including abuses of improperly denied legalization applicants — are so difficult for state and local governments to root out is that undocumented workers are afraid to report such abuses, not only for fear of losing necessary and, perhaps, irreplaceable jobs, but also for fear that their undocumented status will be detected and they will be deported. This is not a phenomenon limited to employment abuses. Studies prepared for the Select Commission on Immigration and Refugee Policy suggest that fear of deportation prevents most undocumented

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[8](...continued)
are beginning to proliferate. In one case, a disguised headhunter confessed that for many months prior to adoption of [IRCA], he obtained a $100 fee for each illegal alien he succeeded in bringing to employers. The latter were able to pay him for obtaining such [exempt alien] prizes."); New York State Inter-Agency Task Force on Immigration Affairs, *The Immigration Reform & Control Act of 1986: New York's Response* 7 (Mar. 1987) (citing as an example one employer who extorted a $500 cash bond from an undocumented alien employee, plus longer hours of work at less pay).

people from approaching any public agency or making use of social services. *See Immigration Reform and Control Act of 1983: Hearings before the Subcomm. on Immigration, Refugees and International Law, House Comm. on the Judiciary*, Mar. 1, 2, 9, 10, 14, 16, 1983, 98th Cong., 1st Sess., 1400 (1983) (American Civil Liberties Union, "Civil Liberties and the Undocumented Alien: The Case for Legalization," Memorandum to House Judiciary Comm. (Mar. 16, 1983)); *see also* H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 4, at 6-7 *reprinted in* 1986 U.S. Code Cong. & Admin. News 5817-18; Simon at 289 (low use of public services by undocumented explained in part by fear of apprehension).

There are notable differences between documented and undocumented families. The former "appear to seek employment openly, and to ask for services that may be available to them. The families that are here illegally are basically families that are in the underground economy with no recourse to redress in case of injustices." Orange County Report at 32 (comments of Meliton Lopez, Ph.D., Superintendent, Anaheim City Schools). "The children of the undocumented tend to be passive and non-participatory while the other children tend to feel good about themselves and there is a willingness to risk." *Id.*[9]

During the final Senate debate on IRCA, Alan Simpson, the bill's co-author, described the illegal population as a "subculture of human beings who are afraid to go to the cops, afraid to go to a hospital, afraid to go to their employer who says 'one peep out of you, buster,

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[9]Many of these children, though suffering the consequences of their parents' undocumented status, are themselves legal residents or citizens of the United States. Wrongful denials of their parents' applications for legalization are particularly unfair to these children.

and you are down the road.' " 132 Cong. Rec. S16,880 (Daily ed. Oct. 17, 1986). State and local governments can neither eliminate abuses nor protect the health and welfare of the general population when a substantial number of persons are afraid to report problems or utilize services. Not only those improperly included among the undocumented, but society at large suffers from diminution of quality of life when they fear to avail themselves of protection. Moreover, exclusion of such persons from those who may openly and freely seek employment denies employers a portion of the legal workforce IRCA was intended to create and denies states and local jurisdictions a portion of the enhanced economic growth which IRCA promised.

The public safety of all residents is a primary concern of local law enforcement bodies, including police and fire departments. Many undocumented residents are unwilling to report crimes or to step forward as witnesses fearing that they will have to disclose their immigration status and, as a result, will be turned over to federal immigration officials for deportation. *See, e.g.*, Orange County Report at 9. "[C]ountless battered or abused undocumented women and children endure the horrors of domestic violence and social discrimination because they fear that calling the police would result in their deportation." Tamayo, *Defending the Rights of the Undocumented: A Challenge to the Civil Rights Movement and Local Governments*, 16 N.Y.U. Rev. L. & Soc. Change 145, 151, (1987-88) (citing D. Jang, Introductory Remarks at a Seminar on Domestic Violence and the Rights of Immigrants and Refugees, Golden Gate University (Sept. 8, 1986)).

Most undocumented workers, particularly denied SAW applicants, do not have private health insurance, and many are unable to afford to pay for medical

Rights of Immigrants and Refugees, Golden Gate University (Sept. 8, 1986)).

Most undocumented workers, particularly denied SAW applicants, do not have private health insurance, and many are unable to afford to pay for medical services because their incomes are below the poverty level. They are reluctant to avail themselves of public health services due to fear of detention and deportation.

> Living illegally in this country with the fear of being detained or deported, many undocumented aliens are unwilling to consult public clinics, and are unable, due to their inability to pay, to consult private physicians. They tend to work at low-paying agricultural or service sector jobs which rarely offer group health insurance coverage. Since many of them are not considered to be residing in the U.S. "under color of law," they are often ineligible for Medicaid and other publicly-financed health programs, even though many of them contribute to Federal, state, and local tax revenues. The fear of being apprehended, combined with the lack of health coverage and the inability to pay, combine effectively to deny poor undocumented aliens access to needed immunization services and primary care.
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> H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 4, at 7 *reprinted in* 1986 U.S. Code Cong. & Admin. News 5818.

In addition, the reluctance of undocumented individuals to seek early treatment of medical conditions often requires more expensive emergency services that could have been avoided. *See Immigration Control and Legalization Amendments: Hearings before the Subcomm. on Immigration, Refugees, and International Law, of the*

see also Office for Refugees and Immigrants for the Massachusetts Legislature, *Preliminary Report, Through the Golden Door: Impacts of Non-Citizen Residents on the Commonwealth*, 21-22 (May 16, 1990) (studies suggest new immigrants need to use more health services, especially to prevent long-term illness and complications at birth) [hereinafter, "Massachusetts Report"]. Accordingly, simple conditions requiring relatively small expenses become serious illnesses that adversely affect all taxpayers.

Congress also itself recognized that undocumented individuals' inabililty to obtain medical services jeopardizes not only the health status of these individuals and their children, but also undermines public efforts to control contagious diseases:

> It is evident to the Committee that the control of contagious disease is of importance not just to the undocumented alien population, but to the community at large. Infections do not recognize borders and do not discriminate on the basis of national origin. In the view of the Committee, there is a strong national public health interest in improving the accessibility of needed immunization and primary care services to this population, and particularly to those on whom the Congress chooses to confer legalized immigration status.

H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 4, at 7 *reprinted in* 1986 U.S. Code Cong. & Admin. News 5818; *see also Immigration Reform and Control Act of 1983: Hearings on H.R. 1510 before the Subcomm. on Health and the Environment of the House Energy and Commerce Comm.*, 98th Cong., 1st Sess., 107 (1983) (testimony of Martin D. Finn, M.D., Medical Director of Public Health Programs, Los Angeles County Department of Health Services) (stating that the benefits of health programs for

immigrants, especially child immunization services, "are for the entire community," and expressing concern about public health problems associated with infectious diseases such as tuberculosis, malaria and enteric diseases, which are common in certain immigrant populations); Massachusetts Report at 23 (Department of Public Health must work to prevent transmission of communicable diseases irrespective of a person's citizenship status).

IV

TRAPPING DOCUMENTABLE WORKERS IN THE SHADOW POPULATION REDUCES REVENUES OF STATE AND LOCAL GOVERNMENTS

A. States Lose Money Intended to Compensate for the Costs of Legalization When Workers Are Trapped in the Shadow Population

States and local governments have borne and will continue to bear substantial costs resulting from IRCA. See New York State Inter-Agency Task Force on Immigration Affairs, *The Immigration Reform & Control Act of 1986: New York's Response* 8-10 (Mar. 1987). Recognizing that legalization would impose heavy costs on state and local governments, Congress originally appropriated $1,000,000,000 per year, minus an offset for certain federal services provided, to fund State Legalization Impact-Assistance Grants. 8 U.S.C.S. § 1255a (note) (Supp. 1990) [hereinafter "SLIAG"]. SLIAG funds can be used to reimburse state and local agencies for certain costs of providing public assistance, educational services, and public health assistance to "eligible legalized aliens" ("ELAs"), and to pay administrative costs. This money is allocated among the states according to the number of ELAs in each state. SLIAG § b(1)(a). An ELA is an alien who has been granted lawful temporary resident status under either the Section 245A Program or the

(Supp. 1990) [hereinafter "SLIAG"]. SLIAG funds can be used to reimburse state and local agencies for certain costs of providing public assistance, educational services, and public health assistance to "eligible legalized aliens" ("ELAs"), and to pay administrative costs. This money is allocated among the states according to the number of ELAs in each state. SLIAG § b(1)(a). An ELA is an alien who has been granted lawful temporary resident status under either the Section 245A Program or the SAW Program. SLIAG § j(4). An eligible worker who has been denied SAW status as the result of unconstitutional practices of the INS does not count as an ELA for SLIAG purposes. Therefore, states where these documentable workers reside lose SLIAG reimbursement.

Adoption of the INS's review argument would delay the ultimate granting of ELA status to documentable SAW applicants, if this correction ever occurs, to a point in the future when SLIAG appropriations to fund further services to them will have run out. SLIAG originally was funded only through fiscal 1991 (the initial funding level has now been stretched out to include funding in 1992; the money may be spent through 1994), and appropriations already have been reduced for 1990. SLIAG § a(1)(B); *see* American Public Welfare Association, *Report from the States on the State Legalization Impact Assistance Grant Program*, Appendix D (May 1989); Inter Agency Task Force on Immigration Affairs Third Report, *Immigration in New York State: Impact and Issues* 11-14 (Feb. 1990) [hereinafter, "New York Third Report"]. By the time these documentable workers can be granted ELA status and "counted" for SLIAG funding, SLIAG is likely to be a memory.

census, the INS's jurisdictional theory would cost state and local governments federal funds and representation allocated by population. Federally funded programs dependent in whole or in part on a state's population as determined in the census include: Mental Health Services for the Homeless Block Grants, Executive Office of the President, Office of Management and Budget: *Catalog of Federal Domestic Assistance 1990*, at 224; Community Development Block Grants, *id.* at 530; Developmental Disability Grants, *id.* at 343, Nutrition Programs for the Aging, *id.* at 347; Adult Education—State Administered Grants, *id.* at 1015; and Migrant Education, *id.* at 1021.

C. Improper Denial of Legalization Applications Reduces Federal, State and Local Revenues

Tax and other revenues resulting from the employment of undocumented workers will decline as these workers are driven "underground" by IRCA's employer sanctions.[10] Governments at all levels lose revenue when

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[10]Most pre-IRCA studies of foreign-born residents in general, and undocumented workers in particular, concluded that federal, state and local tax revenues derived from this population exceeded the costs of any services provided them, although the costs were borne disproportionately by local governments, while the revenues flowed primarily to state and federal treasuries. *See* K. McCarthy & R. Burciaga Valdez, *Current and Future Effects of Mexican Immigration in California* 52 (Rand Corp. 1986); Undocumented Workers Policy Research Project Report, Lyndon B. Johnson School of Public Affairs Policy Research Project Report Number 60, *The Use of Public Services by Undocumented Aliens in Texas: A Study of State Costs and Revenues* 78-90 (1984); Memorandum from Los Angeles County Chief Administrative Officer Harry L. Hufford to Los Angeles County Board of Supervisors Re: Costs of Services to Undocumented Aliens (Apr. 14, 1982) (available from County of Los Angeles); *see also* Jensen, *Patterns of Immigration and Public*

(continued...)

workers who should be eligible for legalization under IRCA are driven into the underground economy. Wages of undocumented workers are more likely to be paid in cash, and employers are far less likely to withhold income taxes, or to remit them to the taxing governments. *See, e.g.*, B. Chiswick, *Illegal Aliens, Their Employment and Employers* 123 (1988); Undocumented Workers Policy Research Project Report, Lyndon B. Johnson School of Public Policy Research Project Report No. 60, *The Aliens in Texas: A Study of State Costs and Revenues* 85 (1984) [hereinafter "Texas Report"]. Wages are generally lower, reducing sales tax collections associated with consumption levels. *See id.* at 53; Note, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 Yale L.J. 409, 412 & n.19, 416, 421 & n.80 (1988); 132 Cong. Rec. H10,588 (Daily ed. Oct. 15, 1986). Workers lack benefits such as health insurance, and may thus be unable to pay for certain preventative, basic and emergency health services.

V

UNDER IRCA, STATE AND LOCAL GOVERNMENTS BEAR THE FISCAL BURDEN OF PROVIDING SERVICES TO PERSONS IMPROPERLY DENIED LEGALIZATION

It is one of the premises of IRCA, and demonstrably true, that the undocumented population will not

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[10](...continued)
Assistance Utilization, 1970-1980, 22 International Migration Review No. 1, at 51, 52 (1988) (citing studies). Immigrants generally have not been shown to consume public services at a greater rate than similarly situated native-born populations. Boyas & Tienda, *The Economic Consequences of Immigration*, 235 Science 645, 649 (Feb. 6, 1987); T. Muller & T. Espenshade, *The Fourth Wave, California's Newest Immigrants* 125-44 (1985).

"go home" despite the worsening economic conditions in which unauthorized aliens find themselves under IRCA. *See, e.g.*, Bean, Vernez & Keely at 72; *see also*, New York Third Report at viii, 5. This is true of persons with no reason to suppose they are eligible for legalization; it must be doubly so for persons whose SAW applications have been erroneously denied, and who know that they are, in fact, documentable. These persons will continue to need health care and social services, but the costs of these services, and of the difficult task of reaching out to this population to overcome the fear inhibiting use of such services, will be shifted increasingly to state and local governments as individuals become less able to pay for needed services and federal assistance to undocumented persons is cut off.

A. Improper Denial of Legalization Cuts Off Federal Assistance to Documentable Persons

In the past, verification of legal immigration status was not a pre-requisite for use of some federal welfare programs and benefits, including Aid to Families with Dependent Children ("AFDC"), food stamps, nutritional assistance for women and children ("WIC"), and Supplemental Security Income, although such programs were generally underutilized by undocumented persons in need of them. *See* Jensen, *Patterns of Immigration and Public Assistance Utilization 1970-1980*, 22 International Migration Review at 52 (1988); Texas Report at xxix, 39. IRCA amended numerous federally funded benefits programs to prohibit their use without verification of an applicant's immigration status. IRCA § 121, amending 42 U.S.C.S. § 1320b-7 (Law. Co-op. 1985 & Supp. 1990) (AFDC, Medicaid, Unemployment Compensation, Food Stamps) (undocumented pregnant women and persons faced with medical emergencies may receive assistance under Medicaid guidelines), and 20 U.S.C.S. § 1091 (Law.

Co-op. 1989 & Supp. 1990) (Student Loans, Grants, Work Assistance). In addition, it created a pilot computerized matching program, Systematic Alien Verification for Entitlements ("SAVE") designed to provide users with a way to check an applicant's eligibility for benefits. Thus, these essential programs have become unavailable to undocumented persons and, along with them, to documentable workers whose SAW applications have been wrongfully denied.

B. The Responsibility for Providing "Safety Net" Services Has Shifted to State and Local Governments

State and local governments have counteracted some of the restrictions placed on benefits to undocumented residents. In July, 1989, New York City proscribed discrimination based on immigration status in the areas of government services, employment, union membership, housing, public accommodations and lending. New York City Administrative Code § 8-17; *see* 3 Legalization Update, Issue 7, at 5 (Oct. 5, 1989). The City University of New York, Arizona State University, Texas state colleges and the University of Illinois at Chicago have explicitly stated that they will allow undocumented state residents to qualify for lower in-state tuition. *Id.*

In other cases, state and local governments do not have the option of refusing services to persons in need of them. This Court held in *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed.2d 786 (1982), that undocumented children cannot be denied access to public education. The cost of educating undocumented children in California was estimated at $2,164 annually per child in 1982, Memorandum from Los Angeles County Chief Administrative Officer Harry L. Hufford, to Los Angeles County Board of Supervisors: Costs of Services to Undocumented

Aliens, Attachment II (Apr. 14, 1982), and in Texas at $2,176 per child in 1982-1983, Texas Report at 67.

Seasonal agricultural workers and their families generally have little education, few skills and low incomes. *See Supra* Section II, pp. 11-12. When SAWs are wrongly denied legalization and prevented from working, therefore, it can be anticipated that these families will require assistance to survive.

Many states make various kinds of assistance available to all persons in need of them, regardless of immigration status, for humanitarian reasons and for the well-being of the state and local population and economy generally. For example, undocumented immigration status does not preclude an otherwise eligible resident of New York City from receiving or making use of WIC funds administered by the state of New York; various crisis and service centers operated by the New York City Human Resources Administration, including shelter care for the homeless; foster care, adoption services and preventive and protective services for children; Head Start programs administered by the New York City Housing Authority; various services provided by the New York City Department for the Aging; City University of New York admission and resident tuition rates; services of the New York City Housing Authority and Board of Education; public health services and city hospital facilities, and the services of the New York City Department of Mental Health Services. New York Department of City Planning, Office of Immigrant Affairs, *Immigrant Entitlements Made (Relatively) Simple: A Pamphlet for Agency Workers* (Jan. 1990).

Numerous states offer — and fund — assistance of various kinds to undocumented residents, including general assistance, medical care, emergency housing and relocation assistance, counseling, and assistance for the

elderly. *See* C. Wheeler, *Alien Eligibility for Public Benefits Part I*, Immigration Briefings, No. 88-11 (Nov. 1988). In addition, all residents, including undocumented aliens, make some use of public safety and fire protection (though undocumented workers may underutilize such services), public transportation, streets and sidewalks, public recreation facilities and other services provided by state and local governments.[11]

All of these services cost state and local governments money, and will cost more money as increasing numbers of undocumented workers are driven out of the legitimate employment market by employer sanctions. There is no reason to add to the burden on the states, counties and cities by adding to this population countless persons wrongly denied both legal status and the benefit of the Constitution by INS patterns and practices.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the decision of the Court of Appeals for the Eleventh Circuit be affirmed.

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[11]Where state and local governments do not provide services to undocumented persons, private charities and volunteer agencies may step in and devote resources to the undocumented that could otherwise be spent on other persons in the community. *See* Orange County Report at 36 (discussing shift of community and charitable agencies from providing "quality of life" services to providing survival aid for persons denied employment and federal aid by IRCA). Private charities report that they are increasingly burdened as a result of IRCA. *See id.* Ultimately, persons who would have received assistance from these organizations may be forced back upon public assistance.

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